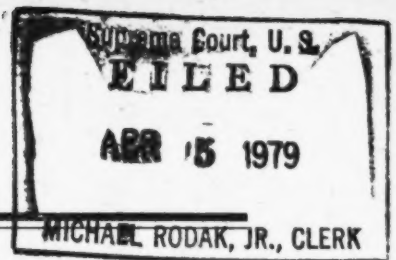


**78-1522**

No.



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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**CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
PETITIONER**

*v.*

**STATE OF UTAH**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE  
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---

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 586 F.2d 756. The opinion of the district court (App. C, *infra*) is unreported.

(1)

## JURISDICTION

The judgment of the court of appeals (App. D, *infra*) was entered on August 8, 1978. A petition for rehearing was denied on December 6, 1978 (App. E, *infra*). On February 27, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including April 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether public lands withdrawn from all forms of private appropriation and placed within a federal grazing district may be selected by a State in lieu of lost school-grant lands without first being classified as available for that purpose by the Secretary of the Interior pursuant to his discretionary authority under Section 7 of the Taylor Grazing Act.

2. Whether the Secretary, in the exercise of such discretion, may decline to classify as open to selection lands which are "grossly disparate" in value to the lost school lands.

## STATUTES INVOLVED

The relevant statutes are:

1. Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109;

2. Sections 2275 and 2276 of the Revised Statutes, as amended, 43 U.S.C. 851-852; and

3. Section 7 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1272, 43 U.S.C. 315f.

These provisions are reproduced in the Appendix, *infra*, pages 1a-9a.

## STATEMENT

1. Like most western states, upon admission to the Union Utah received grants of public lands for school purposes. See P. Gates, *History of Public Land Law Development* 288-318 (1968). Utah was specially favored, however, in being granted four sections in every township, instead of the usual two. Utah Enabling Act of July 16, 1894, ch. 138, Section 6, 28 Stat. 109, *infra*, App. 1a.<sup>1</sup> Originally, school grants were valid only if, upon survey, the designated section was believed to be "non-mineral" in character. Utah claimed exemption from that rule, but lost. *United States v. Sweet*, 245 U.S. 563 (1918). A decade later, however, Congress changed the law to validate the earlier grants of sections "in place" notwithstanding the land was mineral. Act of January 25, 1927, ch. 57, 44 Stat. 1026-1027. In the particular case of Utah, that was a very significant change which, indirectly, gives rise to the present case, in which Utah claims indemnity lands to replace some 245 lost sections said to be mineral in character.

<sup>1</sup> This no doubt accounts in part for the comparatively large number of acres still unselected by Utah before 1965. See note 9, *infra*.



Long before the school grants to Utah, Congress had provided for the case where such grants were lost to the State because the designated sections were fractional or because, before a survey was approved, the lands "in place" were appropriated by settlers, disposed of to others, or set aside as part of a federal reservation. In all such eventualities, the State was entitled to select other "unappropriated" public lands of equal acreage. R.S. 2275-2276. The Utah Enabling Act itself made a like provision for selection of lands in lieu of lost school grants. Act of July 16, 1894, Section 6, 28 Stat. 109.<sup>2</sup> These "indemnity" or "lieu" selections could not, until 1958, include mineral land. *E.g.*, 43 U.S.C. (1952 ed.) 852. But, in 1958, the ground rules were changed once more, and henceforth mineral land could be selected provided the original lost section was also mineral in character. Pub. L. No. 85-771, Section 2, 72 Stat. 928-929, now 43 U.S.C. 852(a)(1), *infra*, App. 3a-4a. The present claim is premised on the indemnity selection statute, as thus amended.

2. Between September 1965 and November 1971, the State of Utah selected 194 parcels of public land of the United States in Uintah County, Utah, comprising 157,255.90 acres (Fdg. 4, App. 56a, *infra*). The tracts designated are 640-acre survey sections,

<sup>2</sup> Notwithstanding the indemnity selection provision of the Enabling Act, Congress amended the general indemnity statute for Utah's benefit by stipulating that references to sections 16 and 36 should, in the case of Utah, be read to embrace also sections 2 and 32. Act of May 3, 1902, ch. 683, section 2, 32 Stat. 189, 43 U.S.C. 853.

except for three large parcels each comprising about 11,000 or 12,000 acres. All the lands selected are located within federal grazing districts established pursuant to Section 1 of the Taylor Grazing Act of 1934, 43 U.S.C. 315 (Fdg. 12, App. 68a, *infra*). Included within the 194 selected parcels are Tracts U-a and U-b, each 5,120 acres, which, since April 1974, are the subject of prototype oil-shale leases issued by the Secretary to third parties (Fdg. 5, App. 61a, *infra*).<sup>3</sup> As of May 1976, total leasing revenues from Tracts U-a and U-b amounted to \$48,291,840. *Ibid.* Sums in excess of \$72 million have now accumulated. All the remaining selections are said to be of mineral lands, chosen in lieu of an equal acreage of lost school land grants which the State claims were also mineral in character. The accuracy of these representations is still to be determined, but may be assumed for present purposes.

In February 1974, the Secretary of the Interior made the following announcement in a letter to the Governor of Utah (R. 70):

As you know, the Department of the Interior has not as yet acted upon the State's applications [for the 194 parcels]. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1972), the Department may refuse to

<sup>3</sup> A description of the Interior Department's prototype oil-shale leasing program was published. 38 Fed. Reg. 33186 (1973); 39 Fed. Reg. 7475 (1974); 39 Fed. Reg. 11208 (1974).

convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication.

Two weeks later, the State filed the present suit against the Secretary.

3. The State's complaint sought title to the 194 parcels selected or, alternatively, an order directing the Secretary to approve or disapprove the State's selections without reference to any disparate values between the selected and "base" or lost lands. In due course, the parties entered into a stipulation identifying the contested issues of law in the case: (a) whether the State's selections could be effective unless the identified lands were first classified by the Secretary, pursuant to Section 7 of the Taylor Grazing Act, as suitable for satisfaction of school indemnity selection rights; and, if not, (b) whether,

in making the required classification, the Secretary may consider the "comparative values" of the selected lands and the lost sections; and (c) whether such a classification constitutes a "major Federal action" under Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), with the possibility that an environmental impact statement would have to be prepared. Thereafter, both sides cross-moved for summary judgment.<sup>4</sup>

On June 8, 1976, the district court issued its findings of fact, conclusions of law, and judgment (App. 54a-79a, *infra*). The Secretary was directed to complete a "ministerial, administrative adjudication" resulting in "a determination as to whether those selection lists [comprising the 194 selected parcels] are in factual compliance with the requirements of

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<sup>4</sup> In addition, the State sought an order requiring the Secretary to pay the oil-shale leasing receipts from Tracts U-a and U-b into the registry of the district court during the pendency of this case. In due course, the court entered orders to this effect, instructing its clerk to deposit equal portions of the impounded leasing receipts with four Salt Lake City banks, by them to be invested in 90-day Treasury bills. On appeal, those orders were affirmed. In our opinion, this action of the district court contravenes the provisions of Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. 191, which requires the Secretary of the Interior to deposit these receipts into the Treasury so that regular distributions of them may be made to particular recipients. We also believe the district court was without jurisdiction to impound these funds. *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 589-590 (D.C. Cir. 1977). Nevertheless, because the question does not appear to have recurring importance, we do not present it for review here.



43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands \* \* \* (App. 77a, *infra*).<sup>5</sup> The district court further held that classification under Section 7 of the Taylor Grazing Act was not required with respect to lands selected by the State pursuant to Section 852, and that the Secretary's contrary regulations were "void." Finally, the court concluded that the National Environmental Policy Act was inapplicable (Concl. 9, App. 74a, *infra*).<sup>6</sup>

On appeal by the Secretary, the Tenth Circuit affirmed the district court's judgment in its entirety. The court of appeals took the view that the school land grant statutes must be treated as "*special acts* completely separate and apart from all other public land grant enactments \* \* \* and given special, independent treatment \* \* \*" (App. 40a, *infra*). The court went on to stress that the "*purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the 'public land' states*" (App. 13a, *infra*), concluding

<sup>5</sup> The judgment originally provided that this administrative adjudication be completed no later than December 15, 1976. However, the district court later stayed this requirement pending appeal to the court of appeals. To date, neither court has entered any subsequent order setting any new deadline.

<sup>6</sup> The impounded oil-shale leasing receipts from Tracts U-a and U-b would "be paid to the party entitled thereto pursuant to the further Order of this Court, when this litigation is fully and finally concluded on the merits" (App. 79a, *infra*). Until then, the district court's management of the impounded leasing receipts was to continue.

ing that this "solemn bilateral agreement between the United States and the 'Land Grant' State of Utah" conferred upon Utah the "unqualified, unambiguous *right* \* \* \* to select 'in lieu' school indemnity lands which are 'mineral in character' for the specific school lands granted which are 'mineral in character' but lost to the State" (App. 48a, *infra*). The State's right of selection was held to override the Secretary's discretion under Section 7 of the Taylor Grazing Act to classify lands as open to selection. The primary conclusion was that Section 7 is inapplicable to the processing of state indemnity selections (App. 39a, *infra*). Alternatively, the court held that, in this context, Section 7 classification is not discretionary and may not take into account the comparative values of "base" and selected lands (App. 49a, *infra*).

#### REASONS FOR GRANTING THE PETITION

The decision below effectively directs the Secretary of the Interior to approve the indemnity selections filed by the State of Utah—all apparently for mineral lands, including some 10,000 acres presently leased under a prototype oil-shale exploration program—provided only three conditions are satisfied: (1) that the "lost" school grant sections (or "base" lands) were "mineral in character"; (2) that the "lieu" lands selected have not previously been disposed of to others or reserved for a specific purpose (such as an Indian or military reservation); and (3) that the total acreage of the lieu lands does not

exceed that of the lost lands. According to the court of appeals, once these bare prerequisites are met, the Secretary must issue a patent to the State, no matter how gross the disparity between the value of the lost lands and that of the indemnity lands selected in lieu, and no matter what other public reasons might argue against approval of the State's selections. The court holds that the Secretary enjoys no discretion to withhold approval of a selection because of gross disparity in value or on any other ground.

The decision affects substantial acreage in several western States, and, if left undisturbed, will prove quite costly to the United States. It also threatens to have a severe disruptive effect on the management of the public domain. The ruling is without warrant in the relevant legislation. Moreover, it overturns half a century of consistent administrative practice, on which other States have relied. The decision is at odds with the congressional understanding, only recently expressed in unequivocal terms. And, finally, the result is wholly inconsistent with the underlying policy of the indemnity statutes to provide the States a rough equivalent for lost school sections, not an opportunity for a hugely profitable trade.

1. The practical consequences of this novel ruling are difficult to confine. The financial loss to the United States is very substantial. Lease revenues derived from the two oil-shale tracts selected by Utah already exceed \$72 million. Even larger sums are presently being collected from lessees under the same program in Colorado, and that State presumably will

now be free to select those lands.<sup>7</sup> There remain, in addition, more than half a million acres to be selected in the western States in lieu of lost school sections. If, in each case, the most valuable mineral or timber land can be chosen, without regard to the value of the lost acres, the total predictable disparity must amount to several hundreds of millions of dollars."

Nor are monetary considerations necessarily the most important. The Department of the Interior has critical responsibilities for managing the public domain in a consistent and rational way, accommodating the many aspects of the public interest involved. The development of new energy sources must be encouraged, but without ignoring conservation needs or overriding recreational, scenic and other environmental values. The oil-shale leasing program, for example, is carefully tailored to respect these concerns. Plainly, the Department's task cannot successfully be performed without a substantial degree of control over alienations from the public domain. That has been recognized at least since President Roosevelt's

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<sup>7</sup> The successful bidders on the two Colorado tracts already leased under the prototype oil-shale leasing program are committed to pay the United States, in addition to production royalties, some \$328 million. The comparable total for the Utah tracts is in excess of \$120 million.

<sup>8</sup> The condition already noticed (*supra*, page 4) that mineral land can be selected only if the lost sections were likewise "mineral in character" is a very limited check on disparity, given the large variation in the value of the many deposits that qualify as "mineral." See, *e.g.*, *Layman v. Ellis*, 52 Interior Dec. 714 (1929); cf. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978).



general withdrawal order of 1934. Exec. Order No. 6910, 54 Interior Dec. 539 (1934). The present decision, exempting State indemnity selections from the Secretary's discretionary classification authority, threatens the best management of the public domain. Of course, the right of the States to select indemnity lands must be respected. But it is entirely possible to satisfy those claims without depriving the Secretary of all authority to take into account the public interest for which he is responsible.

2. The present decision, it is true, is not in direct conflict with the ruling of any other court. This is, we suggest, because it has so long and so generally been accepted that the relevant statutes afford the Secretary of the Interior a substantial measure of discretion in approving State indemnity selections. But it does not follow that the ruling below is a "sport" in the law that may be left to be gradually eroded by contrary decisions. As it happens, all of the acreage remaining to be selected in lieu of original school grants lies within the boundaries of only two circuits.\* For this reason, and to avoid unequal treatment, the Secretary may deem himself required to follow the rule of the present case in both the Ninth and Tenth Circuits if the judgment below becomes final. Accordingly, we cannot await the development of a conflict of decisions. As a practical matter, the

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\* The States with outstanding school indemnity selection rights and the approximate acreage involved are: Arizona, 170,000 acres; California, 180,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres.

occasion for asking this Court's review is now or never.

3. As we have said, the decision below is wholly inconsistent with the long-settled administrative practice, expressly endorsed by the Congress. Nor do the relevant statutes compel disregard of the established rule. On the contrary, we read the critical provisions as confirming the Secretary's discretion.

(a) The provisions that grant to States the right to make indemnity selections of land in lieu of lost school sections are today codified at 43 U.S.C. 851-852 (*infra*, App. 2a). The court of appeals thought those provisions dispositive. But they are, at best, ambiguous as to whether lands within a Taylor Grazing Act district (as all Utah's selections concededly are) remain available for selection without further action by the Secretary of the Interior.

Section 851 announces that the right to indemnity selection arises whenever the school section originally granted has been lost to the State by private settlement, by other disposition from the United States, or because "before title could pass to the State" the lands have been "included within such Indian, military, or *other reservation*" (emphasis added).<sup>10</sup> And, as one would expect, it is provided that "such selec-

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<sup>10</sup> It has long been settled that the original grants of numbered sections do not take effect until approval of a final survey and that an intervening settlement, disposal or reservation of the lands defeats the grant "in place." *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634 (1876); *United States v. Morrison*, 240 U.S. 192 (1916); *United States v. Wyoming*, 331 U.S. 440 (1947).

tions may not be made within the boundaries of said reservation." The Utah Enabling Act itself contains comparable provisions. Act of July 16, 1894, ch. 138, Section 6, 28 Stat. 109, *infra*, App. 1a.<sup>11</sup> Thus, when Section 852(a) says that indemnity selections may be made from "any unappropriated \* \* \* public lands within the State," we know that lands "reserved" by the United States are deemed "appropriated" and therefore unavailable for selection.<sup>12</sup> And it is plain that any federal "reservation" that would defeat an original school grant will likewise prevent indemnity selection of such withdrawn lands. What is not wholly clear on the face of these provisions, however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection?<sup>13</sup>

<sup>11</sup> Indeed, the Enabling Act may be more explicit in applying the same rule in all cases, including temporary withdrawals. It *first* exempts from both the original grant and indemnity selection "permanent reservations for national purposes," and then *adds*: "nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain" (emphasis added). *Infra*, App. 1a.

<sup>12</sup> This is now indirectly confirmed in Section 852(d)(1), which provides that lands as to which only the mineral rights have been "withdrawn" will be deemed "unappropriated" for the purposes of the indemnity selection statute. *Infra*, App. 7a.

<sup>13</sup> Notwithstanding the contrary implications in the opinion of the court of appeals, it is clear that lands which are law-

(b) The answer to the question just posed was assumed in the negative as early as *Wyoming v. United States*, 255 U.S. 489 (1921), the case so much relied upon by the court below. What was there at issue was the effectiveness of a "temporary" withdrawal of lands as potentially mineral under the Pickett Act of June 25, 1910 (43 U.S.C. (1970 ed.) 141). The State prevailed, not because such a withdrawal was insufficient, but only because the indemnity selections had been filed well *before* the withdrawal. See 255 U.S. at 495, 508-509. See, also, *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 234, 236, 237-238 (1921). If any doubt remained, it was put to rest by *United States v. Wyoming*, 331 U.S. 440 (1947), where a Pickett Act withdrawal of lands, without the creation of any special-purpose reservation, was held to defeat an original school grant. *Id.* at 442 and n.4, 444, 456. See, also, *State of Utah v. Work*, 6 F.2d 675, *aff'd* on independent grounds, 273 U.S. 649 (1926). That rule governs here since, as we have seen, any withdrawal that prevents an Enabling Act grant from attaching likewise (perhaps a *fortiori*) removes the lands from indemnity selection.

This brings us to the general withdrawal of November 1934. By Executive Order No. 6910, the Presi-

fully appropriated or included in a special reservation at any time before the indemnity selection is made and filed are thereby removed from the selection pool. See *Wyoming v. United States*, 255 U.S. 489 (1921). Accordingly, in this case, any qualifying withdrawal made before 1965 would render the affected lands unavailable for selection, absent a release of such lands by reclassification.



dent, expressly invoking the Pickett Act and following its terms *verbatim*, withdrew and "reserved for classification" under the recently enacted Taylor Grazing Act all "vacant, unreserved and unappropriated public land" in certain States, including Utah. 54 Interior Dec. at 540. Although labelled "temporary," the order remains in force today.<sup>14</sup> The effect of this action—as the court of appeals itself at one point seems to agree (Pet. App. 16a)<sup>15</sup>—would seem to have been to prevent any further indemnity selections except as land was "reclassified" for that purpose. That is what has always been understood. See Solicitor's Opinion of February 8, 1935, 55 Interior Dec. 205, 210-211; *State of Arizona*, 55 Interior Dec. 249, 253 (1935); *State of Arizona*, 59 Interior Dec. 317, 321-322 (1946); *State of California*, 59 Interior Dec. 451 (1947); *State of California*, 67 Interior Dec. 85 (1960); *State of Utah*, 71 Interior Dec. 392 (1964). See, also, 42 OP. ATT'Y. GEN. 173, 180-181 (1963). Indeed, the withdrawal was deemed so effective that, absent remedial legislation, the Secretary found no authority to release any part of the affected lands for State indemnity selection. See 59 Interior Dec. at 321.

<sup>14</sup> Although the Pickett Act was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, that statute expressly provides that previous Pickett Act withdrawals shall remain in "full force and effect until modified." Section 701(c), 90 Stat. 2786.

<sup>15</sup> Later, however, the court holds that "nothing in [this order] can be construed to apply to state school indemnity selections." App. 51a, *infra*.

(c) The Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269 (now 43 U.S.C. 315 *et seq.*), authorized the Secretary of the Interior to place in grazing districts "pending its final disposal" any public land not already dedicated to specified purposes. Section 1, 43 U.S.C. 315. Much of the land withdrawn by Executive Order 6910 a few months later was ultimately included in grazing districts, and this evidently happened in the case of Utah. As already noted, however, there was no mechanism for unlocking such withdrawn lands, except for homesteading. See Section 7, 48 Stat. 1272. That problem was solved two years later by an amendment to Section 7. Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f, *infra*, App. 8a. This critical enactment provided, *inter alia*:

That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910) \* \* \*, or within a grazing district, which are \* \* \* proper for acquisition in satisfaction of any outstanding lieu \* \* \* rights or land grant, and to open such lands to \* \* \* selection \* \* \* for disposal in accordance with such classification under applicable public-land laws, \* \* \*. Such lands shall not be subject to disposition \* \* \* until after the same have been classified and opened to entry: \* \* \* *Provided*, that upon the application of any applicant qualified to make \* \* \* selection \* \* \* under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such

application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to \* \* \* select \* \* \* such lands if opened to entry as herein provided.

On its face this amendment embraces State lieu selection rights, and that is how it has been administered. States applying for indemnity lands were required to file a petition for discretionary classification under this Section. This is reflected in regulations published in 1943 "to show the change in procedure," 8 Fed. Reg. 7284 (1943), and continued to this day. 43 C.F.R. 2400-3(a), 2450.1, 2621.2(a). Indeed, if Section 7 of the Taylor Grazing Act were inapplicable, it is difficult to appreciate under what authority the Secretary can approve a State selection of lands still withdrawn.

(d) There seems to be some suggestion in the opinion of the court of appeals that, whatever the Secretary's discretionary authority may have been before, it was removed by recent amendments to the indemnity selection statutes. App. 16a, *infra*. Emphasis is placed on the retention of the acre-for-acre formula, with no mention of comparable value, except only that selection of mineral land is conditioned on the lost land also being "mineral in character." See 43 U.S.C. 852(a)(1), as added by the Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928, *infra*, App. 4a.

The fact is, however, that nothing in the amendments to Section 852 releases withdrawn land (as opposed to minerals separately reserved) for indemnity selection or affects the Secretary's classification

discretion with respect to such lands under Section 7 of the Taylor Grazing Act. On the contrary, the legislative history of both the 1958 and the 1960 amendments to the indemnity selection statutes makes it quite clear that nothing has changed in these respects. Thus, in 1958, the report of the relevant House Committee (H.R. Rep. No. 2347, 85th Cong., 2d Sess. 2 (1958)) stated:

The Department of the Interior noted its assumption "that nothing in this bill is intended to affect the rights or duties of States under other laws" and, in particular, "that no change is intended to be made in section 7 of the Taylor Grazing Act, as amended (43 U.S.C., sec. 315f)." The Committee on Interior and Insular Affairs concurs.<sup>16</sup>

The reference to Section 7 of the Taylor Grazing Act in connection with a bill dealing only with State indemnity selections is not unequivocal. But any ambiguity was removed in 1960 when, considering a further amendment of Section 851 (Act of Sept. 4, 1960, Pub. L. No. 86-786, 74 Stat. 1024), the same Committee unequivocally said (H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960)):

\* \* \* [A] selection by a State can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu

<sup>16</sup> See, also, S. Rep. No. 1735, 85th Cong., 2d Sess. 2, 4, 11 (1958), which incorporates Interior Department letters to the same effect.



right, as provided in section 7 of the Taylor Grazing Act (43 U.S.C., sec. 315f).

\* \* \* \* \*

\* \* \* The prohibition against the selection of producing and producible lands subject to lease or permit would be continued. So also would the Taylor Grazing Act provisions referred to above.

(e) We need go no further. A fair reading of the relevant texts at least permits the construction that Sections 851 and 852 at all times prevented the selection by States in lieu of their lost school sections of lands withdrawn for any purpose, however general, until and unless the Secretary of the Interior, pursuant to his discretionary authority under the Taylor Grazing Act, agreed to classify them as available for such selection. That has been the undeviating administrative practice for almost half a century, and, as such, entitled to special weight. *Udall v. Tallman*, 380 U.S. 1, 19 (1965). And, finally, Congress, having "revisited the Act \* \* \* [,] left the practice untouched," indeed expressly endorsed it. See *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors v. First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14. See also *Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1, 23-24 (1976); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

4. The remaining question is whether the Secretary of the Interior has permissibly exercised his discretion under Section 7 of the Taylor Grazing Act by declining to classify as available for indemnity

selection lands of grossly disparate value to the lost school sections.

(a) On the face of the statute, the Secretary would seem to be wholly free to refuse to classify particular land in any particular way. Presumably, the words "in his discretion" at the head of Section 7 qualify all that follows. Thus, in cases not involving State indemnity selections, the courts have recognized a broad discretion in the Secretary. *E.g.*, *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); *Pallin v. United States*, 496 F.2d 27, 34 (9th Cir. 1974). And one court has expressly held that "the market value of the lands being classified" properly may be considered as part of the "broad powers and manifold options" of Section 7 discretion. *Boothe v. Hickel*, 347 F. Supp. 1273, 1276 (D. Nev. 1969), aff'd *sub nom. Bronken v. Morton*, 473 F.2d 790, 797-798 (9th Cir.), cert. denied, 414 U.S. 828 (1973).

It is not obvious why that approach is not equally applicable here. We may assume that the Secretary would be abusing his discretion if he refused to classify as available sufficient lands to satisfy outstanding State indemnity selections. So, also, he might be faulted if he approved selections only when the lieu lands were *less* valuable than the lost sections. But the Secretary cannot be charged with any such questionable action. The rule he has adopted is simply to insist on rough equivalence, permitting the States to gain a modest advantage but not an unconscionable one. Nor is there any suggestion that

the formula prevents the States with outstanding selection rights from fully satisfying them and enjoying a meaningful choice in exercising those rights.

Finally, the Secretary is not rewriting the indemnity selection statutes in imposing a value criterion. Of course, the "acre-for-acre" and "mineral-for-mineral" provisions of Sections 851 and 852 must be observed, once that statute takes hold. But, before Sections 851 and 852 can apply at all, withdrawn land must be unlocked, and, in making that classification decision, the Secretary must exercise the discretion expressly conferred upon him by Section 7 of the Taylor Grazing Act. Plainly, unless classification authority is entirely meaningless, the Secretary cannot be bound to approve every selection that satisfies Sections 851 and 852. He might reasonably apply public interest criteria other than, or in addition to, monetary value equivalence. But there can be no proper complaint about the modest rule against gross disparity in value at issue here.

(b) Again, the rule applied to Utah is not a novel deviation from previous practice. At least since 1965, the Department of the Interior has consistently followed a policy of refusing to classify as available for indemnity selection lands of "grossly disparate value" to the lost acreage. Nor is this a vague, undefined standard. The precise formula now employed was articulated in January 1967 (R. 50):

\* \* \* If the estimated value of the "selected lands" is more than \$100 per acre, then the values will not be considered grossly disparate

if the value of the "selected lands" exceeds the value of the "base lands" by less than \$100 per acre or by 25% of the value of the "base land," whichever is greater.<sup>17</sup>

And, here also, the Department's practice has won congressional approval. In January 1974, Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, joined by Senator Metcalf, the Chairman of the Subcommittee on Minerals, Materials and Fuels, wrote the Secretary of the Interior concerning the prototype oil shale leasing program and its relation to State indemnity selections. On behalf of the Committee, the Senators expressed concern about the very applications involved in this case and endorsed the Department's policy of barring selections of grossly disparate value:

There is one further complicating factor with respect to the Department's [oil shale leasing] program. That is the pending State indemnity selection applications filed by the State of Utah, for 157,000 acres of Federal land in Utah. We understand that these selections include the two Utah tracts the Department intends to lease as part of the prototype program.

We are well aware of the longstanding controversy over selection of "mineral-rich" lands by the States in satisfaction of their statehood

<sup>17</sup> It should be noted, however, that the formula does not exclude the exercise of discretion. The memorandum goes on to provide:

If such estimate exceeds these limits, the case will be submitted to Washington for evaluation of all the circumstances.

grants. We agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a "gross disparity" of value between the lost lands and the selected lands. If you intend to change that policy, we request that you notify this Committee before opening any "mineral-rich" lands to selection.

In any event, it seems to us that the Department should decide the state selection question before going ahead with the prototype program. It is our understanding that if the State of Utah takes title to these oil shale lands, that it intends to offer them for development. Any large scale development on these lands would appear totally inconsistent with the objectives of the Department's prototype program.<sup>18</sup>

(c) After the opening of "mineral-rich" lands to State selection in 1958, a proper concern for the national public interest prompted the Department of the Interior to look to comparable values in considering State indemnity selections. This is no grudging implementation of the congressional decision. Rather, insistence on rough value equivalence in lieu selections carries out the legislative purpose to offer a fair replacement for lost grants, not an opportunity for profiteering. We may surmise that Congress left it to the Secretary to prevent abuses within the very wide limits left by the acre-for-acre and mineral-for-mineral guidelines. Certainly, he was acting well

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<sup>18</sup> *Oil Shale Leasing: Hearings on S. 2413 Before the Senate Subcomm. on Minerals, Materials and Fuels, 94th Cong., 2d Sess. 26 (1976).*

within the ambit of his statutory discretion. In our submission, the courts below misread the controlling provisions and failed to accord the weight due to well-established administrative practice, known to the Congress and expressly endorsed.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.  
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APRIL 1979



APPENDIX A

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STATUTES INVOLVED

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1. *Utah Enabling Act*

Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109:

That upon the admission of said State [of Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reser-

vation shall have been extinguished and such lands be restored to and become a part of the public domain.

## 2. School Indemnity Selection Statutes

Sections 2275 and 2276 of the Revised Statutes, as restated and revised by Sections 1 and 2 of Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928-929, and as thereafter amended, 43 U.S.C. 851-852:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes [43 U.S.C. 852], by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in

lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing herein contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

SEC. 2276. (a) The lands appropriated by section 2275 of the Revised Statutes [43 U.S.C. 851], shall be selected from any unappropriated, surveyed or unsurveyed public lands within the

State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided,*

*however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit



as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of the Act of September 27, 1944 (58 Stat. 748), as amended (43 U.S.C., sec. 282) on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which

it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than the said Act of September 27, 1944, or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d)(1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time.

### 3. *Taylor Grazing Act*

Section 7 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1272, as amended by the Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f:

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by

the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

## APPENDIX B

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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No. 76-1839[Filed August 8, 1978]  

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STATE OF UTAH, by and through  
its Division of State Lands, APPELLEE

v.

THOMAS S. KLEPPE, individually and as Secretary of  
the Interior of the United States, APPELLANT  

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Appeal from the United States District Court for the  
District of Utah, Central Division(D.C. No. C-74-64)  

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Submitted: April 20, 1978  

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Carl Strass, Attorney, Appellate Section, Justice Department, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Ramon M. Child, United States Attorney, Salt Lake City, Utah, and Raymond N.

Zagone, Gerald S. Fish and Dirk D. Snel, Department of Justice, Washington, D.C., on the brief) for Appellant.

Richard L. Dewsnup, Special Assistant Attorney General, Salt Lake City, Utah, (Vernon B. Romney, Utah Attorney General, Robert B. Hansen, Deputy Attorney General, Dallin W. Jensen, Assistant Attorney General, and Clifford L. Ashton, Special Assistant Attorney General, Salt Lake City, Utah, on the brief) for Appellee.

Amicus Curiae:

Frank J. Allen of Clyde and Pratt, Salt Lake City, Utah, for Amicus Justheim Petroleum Company.

Guy G. Hurlbutt, Deputy Attorney General of Idaho, (Wayne L. Kidwell, Attorney General of Idaho, and Peter E. Heiser, Jr., Chief Deputy Attorney of Idaho, on the brief), for Amicus State of Idaho.  

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Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

The United States, by and through the Secretary of the Interior (Secretary) appeals from a summary judgment granted in favor of the appellee, State of Utah (Utah) enjoining the Secretary to approve or disapprove no later than December 15, 1976 (since stayed) Utah's school land grant "indemnity selec-



tions" of 194 parcels of public lands embracing approximately 157,255.90 acres situated in Uintah County, State of Utah. The surveyed "indemnity selections" or "lieu lands" are for school land grants-in-place which were denied Utah because of federal preemption, private entry prior to survey, or before title could pass to the state.

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. *It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific*

*purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states. The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.*

Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. *State of Nebraska v. Platte Valley Power and Irr. Dist.*, 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands.



The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of pre-existing rights of others. *McCreery v. Haskell*, 119 U.S. 327 (1886).

The material facts in the case at bar were stipulated and are not in dispute. Following all pleadings, including the stipulation and pre-trial order, the respective parties moved for summary judgment pursuant to Fed. Rules Civ. Proc., rule 56, 28 U.S.C.A. The trial court entertained oral arguments and considered extensive briefs prior to entry of its Findings of Fact, Conclusions of Law and Decree on June 8, 1976. The trial court held that the discretion to be exercised by the Secretary in acting upon Utah's school land indemnity selection lists is confined to the narrow range set forth in 43 U.S.C.A. §§ 851 and 852. On appeal, the Secretary contends that the trial court erred in not finding that his discretion is very broad pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C.A. § 315f. A recital of the background leading to the instant dispute should aid our review.

Section 6 of the Enabling Act of Utah, approved July 16, 1894, 28 Stat. 107, grants to Utah sections 2, 16, 32, and 36 in every township in the State for the support of the common schools. It further provides that Utah may select other lands in lieu of those sold or otherwise disposed of.

Congress provided under 43 U.S.C.A. § 851 (R.S. § 2775; Feb. 28, 1891, c. 384, 26 Stat. 796, et seq.)

that whenever title to any of the school sections granted to the State of Utah did not pass because of federal pre-emption (reservation) or private entry (homestead settlements), Utah was entitled to ". . . other lands of equal acreage [which] are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 . . . ." (Emphasis supplied.) Confusion reigned as a result of language contained in the Homestead Act of 1862 [Ch. 75, 12 Stat. 392] which limited *land entries* thereunder to "non-mineral lands." Subsequent mining legislation provided that federal mineral lands were expressly reserved *from sale* except as otherwise expressly directed. The Department of the Interior adopted an administrative interpretation that "known mineral lands" were excluded "by implication" in the Utah Enabling Act. This interpretation was upheld by the Supreme Court in the case of *United States v. Sweet*, 245 U.S. 563 (1918) where the Court held that because the Utah Enabling Act of July 16, 1894, did not make specific mention of mineral lands that the school section grant was not intended to embrace land known to be valuable for "known minerals." This was changed by the Congress under the Act of January 25, 1927, 44 Stat. 1026-1027, as amended, 43 U.S.C. §§ 870, 871 which specifically provided that ". . . the several grants to the States of numbered sections in place for the support or in aid of the common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been

granted to and/or selected by and certified or approved, to any State or States as indemnity or in lieu of any land so granted by numbered sections," and "the grant of numbered mineral sections under this section (§ 870) shall be of the same effect as prior grants for the numbered non-mineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered non-mineral sections." Notwithstanding this legislation, however, Utah was denied title to mineral lands in relation to in-lieu selections resulting from vast withdrawals or other actions taken to make the public lands unavailable for in-lieu selections. The problem appeared to have been resolved in Utah's favor, however, by the passage of 1958 and 1966 amendments to 43 U.S.C. § 852 (Act of August 27, 1958, 72 Stat. 928; Act of June 24, 1966, 80 Stat. 220), following which the statute read:

43 U.S.C.A. § 852 Selections to supply deficiencies of school lands

(a) The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made to indemnify for lands on such a structure lost to the State because of appropriation before title could pass to the State; and . . . .

The 194 "in lieu" selection parcels selected by Utah in the instant case were made following the aforesaid Congressional amendments to 43 U.S.C. § 852, *supra*. Accordingly, Utah was entitled to select "in lieu" lands mineral in character *if* the base lands lost to the state were also mineral in character. At oral argument, it was agreed that the 194 "in lieu" selections by Utah were made following Utah's determination, through use of its expertise, that the base lands lost were "mineral in character" and that the selected "in lieu" lands were likewise "mineral in character." We deem it important here to observe that apparently at the time of the selections by Utah *none* of the "base lands" lost and *none* of the "in lieu" lands selected were productive of oil, gas or other minerals. Thus, no contention is presented that any of the lands were "in areas of known geologic structures," or, if so, that any of Utah's in-lieu selections would prejudice pre-existing rights of the United States. It is Utah's contention, then, that the sole and exclusive determination to be made by the Secretary is confined to the ministerial matter of determining whether the base lands lost and the "in lieu" lands selected are "mineral in character" and equal in average. Utah argues, accordingly, that the Secretary is confined to a ministerial review of Utah's selection lists based



upon the "mineral in character" criteria and the attendant acre-for-acre measurement, pursuant to the Utah Enabling Act and the provisions of 43 U.S.C. §§ 851, 852. The Secretary contends that pursuant to Section 7 of the Taylor Grazing Act (43 U.S.C. § 315f) he has much broader discretion, *i.e.*, he may "classify" the 194 "in lieu" parcels on the basis of "value-for-value" against the base lands lost to Utah, apparently predicated primarily on the "mineral in character" criteria.

In answer to Utah's allegation in its Complaint filed in the district court that the base lands lost were "mineral in character" the Secretary averred that he lacked sufficient information with which to form a belief; he alleged that he had not made any determination that "lieu lands" were mineral in character. To our knowledge, no such determination has yet been made, even though Utah commenced submitting its selection lists in 1965, the last of which were submitted November 10, 1971.

At oral argument, counsel for the Secretary contended that the Secretary *may* determine, within the broad spectrum of the right to "classify" the "in lieu" lands pursuant to Section 7 of the Taylor Grazing Act, *supra*, to conduct extensive investigations to determine the nature, value, and extent of the non-produced "mineral in character" aspects of both the lost "base lands" and the "in lieu" lands selected in order to ascertain that the "base lands" are of *equal value* to the "in lieu" lands selected. At no time or in anywise has the Secretary seen fit to in-

form the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are non-existent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. We believe that it is most unlikely that Congress intended to vest such discretion in the Secretary in light of the historical background leading to the enactment of the "in lieu" statutes heretofore referred to. The procedure prior to the Secretary's interpretation of the applicability of Section 7, *supra*, was that once a state submitted the indemnity selection list identifying the character and description of both the base lands for which indemnity is sought and the identity of the selected lands that the Secretary proceeds to publish notice providing any adverse claimant of the right to challenge the selections prior to execution of a "Clear List" document by which the Secretary certifies that (a) the lands designated as base lands in a selection list were properly categorized and described by the state and (b) the selected lands were in fact unappropriated federal public domain on the date the selection list was filed.

The Act of May 3, 1902, 32 Stat. 188, 43 U.S.C.A. § 853 provides that all of the provisions of §§ 851 and 852, relating to the selection of lands for educational purposes and indemnity therefor are made applicable to the State of Utah.

Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (United States v. Union Pacific Railroad Company, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. State of Wyoming v. United States, 255 U.S. 489 (1921). We deem this to be particularly significant in recognition that the sole specific Congressional reference in § 852(a)(1), *supra*, relates to lands “. . . mineral in character may be selected by a State [if] . . . the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; . . .” No reference whatsoever is made to the *value* of the “minerals in character.” This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing “acre for acre” selection basis. U.S. Code, Cong. & Ad. News, 2nd Session, Volume II, p. 2324 (1966).

The Utah Enabling Act provides that all lands granted for educational purposes (except as otherwise provided therein) shall constitute a permanent school fund. Section 10, 28 Stat. 107, Act of July 16, 1894. The federal grant in trust to Utah for the support of its public school system was accepted by

Utah subject to constitutional guaranties that the proceeds of sales of all lands granted for the support of the common schools shall ~~be~~ and remain a permanent fund, the interest of which only shall be expended for the support of the common schools, and any loss or diversion of all public school funds shall be restored. §§ 3 and 7, Article X, Constitution of Utah.

To reiterate, commencing September 10, 1965 through November 19, 1971, Utah filed 194 lieu land selection lists with the Bureau of Land Management, Department of the Interior, covering 157,255.90 acres of land in Uintah County, Utah, to serve as indemnification for school lands in place, mineral in character, which were denied Utah because of federal reservation and preemption or private entry prior to survey. The selection process involved Utah's determination of the “mineral in character” of the lands it had lost and the “mineral in character” of the “in lieu” lands it had selected. We are told and assume that this process required much study and expertise. It is undisputed that Utah's 194 selections were in compliance with the statutory criteria set forth in 43 U.S.C.A. § 852, *supra*. Even so, the Secretary has taken no action with respect to any of them, notwithstanding that many have been pending for a period in excess of ten years.

While the aforesaid 194 selection lists were pending, an agreement was entered into between Utah and the Secretary concerning two prototype oil shale leases issued by the Secretary embracing some 10,240



acres within the lands selected by Utah. In the course of this litigation, the District Court ordered that all bonus funds and rental proceeds derived from the two leases during the pendency of this action be paid into the registry of the court to be invested as directed by the court; as of May 25, 1976, some \$48,291,840.00 had been paid into the district court registry and duly invested.

The District Court summarized Utah's position to be: that the Congress had expressly granted and appropriated lands to Utah to be selected as indemnification for original school lands that Utah did not receive because of federal pre-emption or private entry prior to survey; that the right of selection is in the discretion of Utah and not the Secretary of the Interior; that upon filing school indemnity selection lists in accordance with 43 U.S.C.A. § 852, equitable title to the selected lands vested in Utah; that the Secretary has a narrow range of discretion in reviewing and acting on such selection lists, limited to a ministerial adjudication to determine only whether such lists are in compliance with the criteria of § 852, *supra*; and, if so, the Secretary is obligated to approve said selections and to issue a clear list to the lands selected, thus vesting legal title in Utah. [R., Vol. III, pp. 103, 104.]

The District Court summarized the Secretary's position to be: that he is authorized and obligated by Section 7 of the Taylor Grazing Act, 43 U.S.C. § 315(f), to classify lands located within grazing districts to determine whether such disposition is ap-

propriate under applicable public-land laws; that in making such classification, the Secretary is authorized in his discretion to utilize public interest criteria, including a comparison of the value of the base school lands lost with that of the lands selected as indemnification; and, further, that classification in favor of disposition for school indemnity selection is a condition precedent to the vesting of any right, title or interest in any state which makes any such school indemnity selection.

Some of the pleadings relied upon by the trial court in granting summary judgment in favor of Utah which we deem significant are:

(1) Appendix B attached to Utah's motion for summary judgment, which is a copy of a Memo dated September 14, 1962, from the Associate Solicitor, Division of Public Lands, to the Director, Bureau of Land Management, stating, *inter alia*: "In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered . . . . When the state lieu selection statutes were last amended in 1958, it was clear Congress recognized the practice by the states of offering as base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law . . . ." [R., Vol. III, p. 42.]

(2) Appendix P attached to Utah's motion for summary judgment, which is a copy of a letter dated February 14, 1974, from then Secretary of the In-

terior Roger Morton, to then Governor Calvin L. Rampton of Utah, stating, in part: "As you know, the [Department] has not as yet acted upon the [Utah] applications. The principal question presented . . . is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect. In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, . . ." [R., Vol. III, p. 70.]

(3) Appendix Q attached to Utah's motion for summary judgment constituting a letter dated February 15, 1974, from Kent Frizzell, Solicitor, Department of the Interior, to Utah Attorney General Vernon B. Romney wherein Mr. Frizzell stated, in part: "We believe that the 'comparative value' criterion is a valid one with respect to classifying lands for State lieu selection; such classification being authorized by Section 7 of the Taylor Grazing Act, 48 Stat. 1272, 43 U.S.C. § 315f (1972). Accordingly, we intend to apply that criterion when we adjudicate the pending State applications." [R., Vol. III, p. 72.]

(4) Affidavit of Donald G. Prince, Assistant Director of State Lands, State of Utah, with attached copy of Memorandum of February 11, 1943, from the Commissioner of the General Land Office, Department of the Interior to the Secretary which notes, *inter alia*: "Following the 1936 amendment to the Taylor Grazing Act (Section 7 relied upon by Secretary in this action), and the promulgation of Circular 1398 which provides that the States 'should state whether the proposed exchanges are to be based upon equal values or equal areas' that all exchanges for the subsequent five year period were, on the States' election, made on the basis of equal area; *that state indemnity school land selections have always been based on equal areas, regardless of the value of the lease or selected lands, citing to California v. Deseret Water Etc. Company, 243 U.S. 415 and Wyoming v. United States, 255 U.S. 489.*" (Emphasis supplied.) [R., Vol. III, pp. 91-94.]

The Secretary vigorously challenges those findings of the District Court limiting the Secretary's authority to classify lands. They include:

*Finding No. 11:* The Taylor Grazing Act was enacted as Public Law No. 482, 73rd Congress, Second Session, identified as the Act of June 28, 1934, 48 Stat. 1269, entitled:

An act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.



The pertinent part of Section 7 of the 1934 Act provided, with respect to the classification authority of the Secretary of Interior, that:

. . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area.

There is no language in the 1934 Act which purports to give the Secretary of Interior authority to classify lands that are selected by States for indemnification of lost school lands, nor is there anything in the legislative history of the 1934 Act that suggests that Congress intended to require classification as a condition to school indemnity selections.

Further, the trial court found that the Secretary had no authority to compare value of lost lands with value of indemnity lands:

*Finding No. 12:* The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 U.S.C. 315(f), describes the Secretary's classification authority in the following language:

. . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable

for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4, above, are located within grazing districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value



of lost base lands with the value of indemnity selections, as part of any classification procedure.

[R., Vol. III, pp. 104-106.]

Significant "Conclusions of Law" on the disputed central issue include:

*Conclusion No. 3:* Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and adopted by the people of the State of Utah.

*Conclusion No. 4:* When original school land grants in place are denied to the State of Utah as a result of federal pre-exemption or private entry prior to survey, the State is entitled to select lands of equal acreage from otherwise unappropriated federal lands within the State, in lieu of and as indemnification for such lost base lands, pursuant to and in accordance with the criteria and limitations set forth in Section 852, Title 43, United States Code. This selection is to be made by the State in accordance with the congressional offer contained in said Section 852;

and, when such selections are duly filed, it is the duty of the Secretary of Interior to make a ministerial adjudication of such selection lists to determine whether they are in accordance with the requirements of said Section 852. If so, the Secretary must honor the state's acceptance of the congressional offer, and thus fulfill the purpose of the public school land trust, by approving said selections; but, if such selections are found not to be in compliance with the congressional criteria contained in said Section 852, the Secretary must deny and reject such selection lists.

*Conclusion No. 5:* If the ministerial adjudication of the school indemnity selection lists, as conducted by the Secretary under said Section 852, reveals that said selection lists were in fact in compliance with said Section 852, then Utah would have acquired equitable title to the lands so selected as of the dates the respective selection lists were filed, and from and after that date Utah would have been entitled to all revenues, rentals, emoluments and benefits arising or accruing from said lands from and after the respective dates when such selection lists were filed.

*Conclusion No. 6:* The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), cannot reasonably be construed to require classification of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests

that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act.

*Conclusion No. 7:* Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made

by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act.

*Conclusion No. 8:* Any and all regulations promulgated by the Secretary of the Interior inconsistent with these Conclusions of Law, and, in particular, any provisions within Part 2620 or Part 2400, 43 C.F.R., that purport to require classification under the Taylor Grazing Act of school indemnity selections filed under 43 U.S.C. 852, are without authority of law, are contrary to law, and are void and of no force or effect.

*Conclusion No. 9:* In view of the narrow, confined, ministerial range of discretion con-



ferred on the Secretary under Section 852 of Title 43, U.S.C., and by Section 315f of Title 43, U.S.C. (if, indeed, the latter section could be construed to apply at all), the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, does not apply to secretarial review and action on school indemnity selection lists. The Secretary must approve those selections if they are in accordance with the congressional grant, appropriation and offer contained in the Utah Enabling Act, 28 Stat. 107, and Sections 851 and 852 of Title 43, U.S.C.

*Conclusion No. 10:* While federal land grants ordinarily are to be narrowly construed in favor of the United States and against the grantee, the reverse rule holds true with respect to school land grants and indemnity selections, the courts will adopt a liberal interpretation of the applicable statutes in order to honor and fulfill the public trust in aid and support of the common schools, and thus achieve the purpose intended by Congress in granting school trust lands.

*Conclusion No. 11:* The Secretary's failure to take any final action any of Utah's school indemnity selection lists which are the subject of this litigation, even though many of such selections have been pending before the Secretary for more than ten years, is "agency action unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1), Title 28, U.S.C.

[R., Vol. III, pp. 107-111.]

On appeal, the Secretary contends that the District Court erred in: (1) finding and concluding that the Secretary does not have administrative discretion to classify school indemnity lieu lands based

upon comparative market values between selected and base lands by virtue of the 1936 amendment to Section 7 of the Taylor Grazing Act, now codified as 43 U.S.C. § 315(f), and (2) assuming jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), to impound the oil-shale leasing receipts for the two tracts on the selection lists leased per agreement of the parties, in that the Mineral Leasing Act, 30 U.S.C. § 191 dictates and controls the manner of distribution contrary to the order of the court.

## I.

We first consider the Secretary's challenge to the district court's finding and conclusion that the Secretary does not have administrative discretion to classify school indemnity lieu lands based upon comparative market values between selected and base lands by virtue of the 1936 amendment to the Taylor Grazing Act, now codified as 43 U.S.C. § 315(f).

The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. *See, e.g.,* Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301 (1903), involving lands owned in fee simple covered by a patent located in a national forest reservation; Wisconsin Central R.R. Co. v. Price County, 133 U.S. 496 (1890), involving selec-



tion of indemnity lands by a railroad land-grant company; and *Hall v. Hickel*, 305 F. Supp. 723 (D.C. Nev. 1969), rev. and remanded on other grounds, 473 F.2d 790 (9th Cir. 1973), *cert. denied*, 414 U.S. 828 (1973), involving "Valentine Scrip" lands. For other "lieu" selection statutes, *see*, 25 U.S.C.A. § 334 (selection rights of Indians residing off of an Indian Reservation) and 43 U.S.C.A. § 274 (selection rights to be exercised by veterans). The distinction was referred to in the case of *Wilcoxson v. United States*, 313 F.2d 884 (D.C. Cir. 1963). The court was involved in a construction of the Isloated Tracts Act. The court held that § 7, *supra*, authorized the Secretary to employ his discretion relative to disposal of the subject lands. The court recognized that such discretion does not apply to the state in-lieu grants for the benefit of the public schools. Other decisions have recognized the classification powers under § 7, *supra*, under specific statutes.

The Section 7 amendment relied upon by the Secretary for authority to "classify" in the instant case does not specifically refer to "in lieu" selections as indemnity for school land grants; rather, reference is there made to the Secretary's authorization to classify lands within a grazing district to determine if those lands are proper for acquisition in satisfaction of "any outstanding lieu . . . rights or land grants . . . ." Thus, we are asked by the Secretary to substitute the general language above cited for the unambiguous, clear and unqualified language in 43 U.S.C. § 851, *supra*, which speaks directly to the subject of lieu selections as indemnity for school land

grants lost to the states by use of the specific, unabridged language directing that the states may select ". . . other lands of equal acreage . . . in accordance with the provisions of section 852 of this Title, by said State to compensate deficiencies for school purposes . . . ." The distinction between the legal rights attendant upon private "in lieu" exchanges of lands and state "in lieu" exchanges as indemnity for lost school land grants was specially recognized in *Lewis v. Hickel*, 427 F.2d 673 (9th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). There, the private exchange provisions of the Taylor Grazing Act were at issue. In their efforts to overturn the decision of the Secretary rejecting their application for a private exchange of lands under the Taylor Grazing Act, the appellants placed "strong reliance" upon *Payne v. New Mexico*, 255 U.S. 367 (1921). The Court stated in this regard:

Appellants place strong reliance upon *Payne v. New Mexico* . . . , a case involving the Secretary's denial of an exchange under an Act granting New Mexico the *right* to select certain lands for the support of the common schools. However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with. *Hence, the power conferred upon the Secretary was merely 'judicial in its nature' (255 U.S., at 371, 41 S.Ct. 333) in the sense that his only function was to ascertain whether the specific conditions had been met.*

*Under the exchange provisions of the Taylor Grazing Act, the power conferred on the Sec-*

*retary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (Emphasis supplied.)*

427 F.2d, at p. 676.

We agree with the finding of the trial court and the rationale in *Lewis v. Hickel, supra*, i.e., that nothing in the language of the Taylor Grazing Act, as amended, or its legislative history, empowers the Secretary to invoke the Section 7 (43 U.S.C. § 315 (f)) "classification" criteria to "in lieu" selections by a state of lands within a grazing district pursuant to the school indemnity selection statutes. We deem it significant that the Secretary has failed to point out that the § 7 classification authority, in any event, relates *only* to surface entry rights. The Act specifically provides that the lands withdrawn for classification remain open to mineral location. 43 U.S.C.A. §§ 315f, 315g(d). The classification power does not extend to the mineral estate.

We reiterate that land grant legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally (in favor of the states) rather than restrictively. *State of Wyoming v. United States, supra*. In *Beecher v. Wetherby*, 95 U.S. 517 (1877), the Supreme Court held that when a state is admitted to the Union and is granted sections 16 in the state upon certain conditions to be ratified by the constitution of the state, and the ratification was made, then the condition became unalterable and obligatory on the United States. This rule is explicit. *See also*: 81A C.J.S., States, § 4b. This court cannot engraft an exception thereon favor-

ing the Secretary's administrative discretion claimed here. We thus hold that the district court did not err in its findings and conclusions that the exchange of school lands lost for "in lieu" lands to be selected by Utah is to be undertaken on the equal acreage basis once it is determined that the respective lands are "mineral in character" without regard to valuation. The value-for-value exchange criteria set forth in Section 7, *supra*, does not apply. The legislative history relating to 43 U.S.C. §§ 851 and 852, *supra*, together with that of the 1936 amendment to Section 7 of the Taylor Grazing Act show complete silence on the part of the Congress of any intent to authorize broadening of the Secretary's classification authority respecting the indemnity selection rights of Utah. However, when we review the provisions of 43 U.S.C. §§ 851 and 852, *supra*, it is strikingly clear that Congress did grant the states broad rights in effecting indemnity selections. There is no question that the "equal acreage" language originally set forth in § 851, *supra*, has been retained throughout its amendatory history. At no time has the Congress used the "equal value" reference.

The trust aspect of the obligation imposed upon and assumed by the respective "public land" states in relation to lands granted for the benefit of the public school system was recently recognized by the United States Supreme Court in *Lassen v. Arizona, ex rel Arizona Highway Dept.*, 385 U.S. 458 (1967). There, the Arizona Supreme Court was reversed in its holding that the Arizona Highway Department could



condemn trust lands acquired by Arizona under § 28 of its Enabling Act for highway construction on the ground that it could be presumed that highways constructed across such trust lands always enhanced the value of the areas taken and that, accordingly, the Highway Department was not required to compensate the trust. The United States Supreme Court emphasized that § 28 of the Enabling Act required that trust lands be sold or leased only to "the highest and best bidder"; that no lands be sold for less than their appraised value; that disposal of trust lands be "only in manner as herein provided"; and that disposition in any other way shall be a breach of trust. The Court held that only sales and leases were intended and that the grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the state could support the public institutions designated by the Act. The *Lassen* court reaffirmed the rule applied in *Ervien v. United States*, 251 U.S. 41 (1919) recognizing strict concern for the integrity of the trust conditions imposed by the various "public land" state enabling acts. In *Ervien*, *supra*, the Court held that actual compensation "in money" must be paid the trust equaling the appraised value. The same stringent trust conditions were again reaffirmed by the holding that a lease by Arizona of lands acquired for the common schools under its Enabling Act can only be executed in consideration of a rental representing its "true value." *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976).

The trial court specifically found that there is nothing in the legislative history of the 1936 amendment to Section 7 of the Taylor Grazing Act to suggest that the classification by the Secretary is a prerequisite to the exercise of Utah's school indemnity selection rights. [R., Vol. III, p. 105.] We agree.

There are established rules of statutory construction supporting the trial court's conclusion that Section 7 does not control here: A statute must be construed as it was intended to be understood when enacted in the light of the conditions as they existed when the act was passed. *United States v. Stewart*, 311 U.S. 60 (1940). Words of a statute are to be interpreted in their ordinary definitions and the meanings commonly attributed to them. *Jones v. Liberty Glass Company*, 332 U.S. 524 (1978). Where there are two statutes upon the same subject, the earlier being special (as is the case with regard to 43 U.S.C. §§ 851 and 852, *supra*) and the later being general (as is the case with regard to the 1936 amendment to the Taylor Grazing Act, 43 U.S.C. § 315(f), *supra*) it is settled law that the special act remains in effect as an exception to the general act unless absolute incompatibility exists between the two, and all matters coming within the scope of the special statute are governed by its provisions. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Missouri K & T Ry. Co. v. Jackson*, 174 F.2d 297 (10th Cir. 1949); *United States v. Fixico*, 115 F.2d 389 (10th Cir. 1940); *Sutherland Statutory Construction*, 4th Ed., Vol. 2A § 51.05. The latter authority summarized the general-special acts rule:



General and special acts may be in *pari materia*. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05, p. 315.

We submit that the strict, continuing "trust" obligations imposed by the Congress upon the "public land" states (and willingly accepted by them) in the school land grant statutes clearly set these enactments aside as *special acts* completely separate and apart from all other public land grant enactments. In that sense, then, these enactments are set apart and given special, independent treatment, much akin to the special preference and treatment of Indians recognized in *Morton v. Mancari*, 417 U.S. 535 (1974).

This court has held that a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies. *Edward B. Marks Music Corp. v. Colorado Mag., Inc.*, 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). Statutes are, in all instances, to be construed in a manner so as to effectuate the intent of the enacting body, and an unambiguous statute must be given its plain and

obvious meaning. *United States v. Ray*, 488 F.2d 15 (10th Cir. 1973); *United States v. Western Pacific Railroad Company*, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). The case of *Bronken v. Morton*, 473 F.2d 790 (9th Cir. 1973) is in point. It involved the issue of the Secretary's power to apply the "comparative value" test of § 7, *supra*, upon denial by the Secretary of the issuance of land patents to holders of "in lieu" selection rights involving "Valentine scrip certificates" issued to compensate lands lost by reason of the Mexican land grant. The "scrip" statute authorized the holder to select an "equal quantity" of certain public lands. The Secretary opted for selection based on "equal value." The court rejected the Secretary's position because the "Valentine" scrip act did not provide "that monetary value of the selected lands" was the criteria.

Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.

*Payne v. New Mexico*, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from canceling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here).

The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:

If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

255 U.S., at p. 370.

Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne, supra*, noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:

The words relied upon (subject to the approval of the Secretary of the Interior) are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

255 U.S., at p. 371.

State of Wyoming v. United States, *supra*, involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to "*wave its right thereto*



*and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state. See: California v. Deseret Water, Etc., Co., 243 U.S. 415 (1917); Payne v. New Mexico, ante, 367. Other laws of general application, §§ 441, 453, 2478, Rev. Stats., require that the selections be made under the direction of the Secretary of the Interior.” (Emphasis supplied.) 255 U.S., at 494.*

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn National Forest. The selected in lieu acreage “was vacant, unappropriated, and neither known nor believed to be mineral . . . .” “The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . .” 255 U.S. at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary exclusive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited surface right-certification or to show that the 80 acres was still not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title

when the selection was made. Accordingly, Wyoming refused the tender. The Commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

*The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, or still later was discovered to be mineral land, that is, to be valuable for oil. (Emphasis supplied.)*

255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful “in lieu” selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state*, but rather:

*. . . of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascer-*



*tainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. (Emphasis supplied.)*

255 U.S., at pp. 496, 497.

The Court equated the “in lieu” selection to a cash entry, citing to *Benson Mining Co. v. Alta Mining Co.*, 945 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in *Daniels v. Wagner*, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary’s position. The Court held that when selections were made in accord with statutes it was the

plain duty of the Secretary to approve them and *that the Secretary’s power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in *State of Wyoming v. United States*, *supra*, directly applicable to the contention raised by the Secretary here that the “value for value” criteria is to be employed in approving the “in lieu” selection at issue is:

. . . If these (selections of “in lieu” lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.

255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative value of tracts which are “mineral in character.” The Supreme Court obliquely recognized this, *supra*, by reference to “whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected.”

Thus, we conclude that the solemn bilateral agreement between the United States and the "Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" for the specific school lands granted which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted—or those selected "in lieu"—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in *State of Wyoming v. United States*, *supra*.

The trial court found yet another reason for rejecting the Secretary's position on the application of Section 7 in concluding that:

... If, however, such classification (as set forth under Section 7, now codified as 43 U.S.C. § 315 (f), *supra*), should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections as part of any classification procedure.

We agree. In our view Section 7 was not directed to school indemnity selection rights because its thrust is to "uses." Section 7 authorizes the Secretary to employ a classification process to determine whether lands within a (Taylor Grazing) grazing district may be adaptable to "uses" having a higher value than grazing. The Secretary was empowered to:

... to examine and classify any lands ... within a grazing district, which are more valuable or suitable for the production of crops for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act....

43 U.S.C.A. § 315(f).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title and subsequent administration by the states under



the solemn trust conditions. Accordingly, the aforesaid "classification" procedures or Section 7 cannot apply to school indemnity selections. Under 43 U.S.C. § 851, *supra*, the Taylor Grazing lands *are appropriated* to the states for indemnity selections. The Secretary is confined to unappropriated lands under Section 1 of the Taylor Grazing Act. 43 U.S.C. § 315. School indemnity selections are not "entries" in the traditional sense. All federal lands in Utah are situate within grazing districts. Thus, we must conclude that if the Secretary's power to "classify" school indemnity lands applies, there are no legislative guidelines or criteria spelling out the scope of such power. The Secretary argues that he has authority under Section 7 to cancel the "in lieu" selections based upon his discretionary power to "classify," but he has not deemed it necessary to spell out the scope or extent of the "classification" power in the case at bar. In fact, he contends that Section 7 "puts no restrictions on the substance of secretarial discretion." [Brief of Appellant, p. 31.] The Secretary's contention is erroneous. The "classification" criteria were spelled out by the Congress for other types of public land dispositions under the 1936 amendment, i.e., homestead entries and exchange of private land. We agree with Utah that, "It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the

land for retention in federal ownership." [Brief of Appellee, p. 60.] The breadth and scope of the right of "classification" claimed by the Secretary creates the very vagueness condemned in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). There the Court held that a statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. *See also*: *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *Sutherland Statutory Construction*, 4th Ed., Vol. 1A, § 21.16.

Finally, we reach the Secretary's contention that classification is likely required under Executive Order 5327 issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders can be construed to apply to state school indemnity selections.

## II.

The Secretary contends that the district court lacked jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), to impound the moneys realized representing oil-shale leasing receipts which Congress, in Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, had previously appropriated for distribution in a way contrary to the trial court's orders.



We disagree. We hold that the District Court did not err by reason of its impoundment and investment orders.

The Secretary, following Utah's indemnity selections, issued two federal mineral leases to third parties on some 5,000 acres out of the lands included in the 194 parcels Utah had selected. Millions of dollars of rentals had been paid to the Secretary by the lessees relating to the oil-shale leases.

Section 35 of the Mineral Leasing Act directs that the Secretary pay all oil-shale leasing receipts into the United States Treasury for later redistribution twice a year in varying percentages to Utah, the federal reclamation fund, and to miscellaneous depositories in the Treasury. Thus, the Secretary contends that nothing in the statutes permits the federal courts from impounding these funds to satisfy some anticipated future judgment not yet rendered. Judicial seizure, contends the Secretary, is a suit against the United States, in this case without its consent. This argument was not raised in the District Court and need not be entertained for the first time on appeal. However, the procedure employed by the District Court appears from the record to have been tacitly consented to by the United States which at no time objected to the orders of the court relative to impoundment or despit. [See, R., Vol. I, p. 69.] In addition, the record reflects that Utah and the Secretary recognized Utah's potential ownership of the leased tracts, together with the lease rentals received, in light of the request by the United States, acceded to by Utah,

that Utah consent to the lease transactions pending the outcome of this litigation initiated to resolve the ownership of the lands and the funds. [R., Vol. III, pp. 73, 74.] In our judgment, *Wyoming v. United States, supra*, firmly supports the trial court's action.

Utah has not pursued an action for damages. In addition, the Tucker Act cannot apply in view of the limit of \$10,000.00 in any civil action or claim thereunder against the United States. 28 U.S.C.A. § 1346 (a) (2). We deem the action of the District Court entirely consistent with Fed. Rules Civ. Proc. rule 67, 28 U.S.C.A., relative to deposit of the funds with the court and the provisions of 28 U.S.C.A. §§ 2041 and 2042 relating to money deposited and withdrawn.

WE AFFIRM.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

Civil No. C-74-64

[Filed June 8, 1976]

THE STATE OF UTAH, by and through  
its Division of State Lands, PLAINTIFF

v.

THOMAS S. KLEPPE, individually and as Secretary of  
the United States Department of Interior, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECREE

The above-entitled matter came on regularly for hearing pursuant to a special setting on Wednesday, February 25, 1976, at 10:00 a.m., and for further oral argument on Tuesday, May 25, 1976, at 10:00 a.m., all in accordance with the Stipulation of the parties dated June 10, 1975, and the Pre-Trial Order of the Court signed and entered on the 16th day of June, 1975, and further in accordance with the respective motions for summary judgment filed by the parties on August 18, 1975; plaintiff was represented at both hearings by Richard L. Dewsnup and Clifford L. Ashton, Special Assistants to the Utah Attorney General, and by Dallin W. Jensen, Assistant Utah At-

torney General, and defendant was represented by Ramon M. Child, United States District Attorney, and by Gerald S. Fish, Attorney with the United States Department of Justice; and the matter having been fully briefed by the parties through primary and answering briefs filed September 15, 1975, and October 15, 1975, respectively, and by plaintiffs' supplemental brief filed March 12, 1976, and defendant's supplemental brief dated April 16, 1976; and the Court now having read and considered the briefs and memoranda on file, and having heard and considered the oral arguments by the parties, and now being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

*Finding No. 1:* Plaintiff Division of State Lands of the State of Utah is an agency of state government having statutory responsibility, acting for and in behalf of the State of Utah, to manage and administer all lands received by the State of Utah under school land grants from the United States, and is authorized and empowered under state law to exercise Utah's rights to select federal lands in lieu of and as indemnification for original school land grants in place that were denied to the State of Utah as a result of federal reservation and pre-emption, or private entry, prior to survey; and defendant Thomas S. Kleppe is the duly appointed, confirmed and acting Secretary of the United States Department of the Interior.

*Finding No. 2:* Plaintiff invoked the jurisdiction of this Court under 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1361 (mandamus); and seeks to compel the defendant to take administrative action that has been "unlawfully withheld or unreasonably delayed" under Section 706(1) of the Administrative Procedures Act, 5 U.S.C. 701 *et seq.*, and to obtain a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, as to the nature and extent of plaintiff's school indemnity selection rights under selection lists heretofore filed with the Bureau of Land Management of the United States Department of Interior; and venue is laid under 28 U.S.C. 1391 (e) (3), since the lands subject to this litigation are located within Uintah County, State of Utah, and thus within the geographic jurisdiction of the Central Division of this Court.

*Finding No. 3:* The amount in controversy, exclusive of interest, attorneys' fees and costs, exceeds \$10,000.00.

*Finding No. 4:* Between the dates of September 10, 1965, and November 19, 1971, plaintiff filed 194 selection lists with the Bureau of Land Management of the United States Department of Interior, covering 157,255.90 acres of land in Uintah County, State of Utah, as lieu lands to serve as indemnification for school land grants in place which were denied to Utah because of federal reservation and pre-emption, or private entry, prior to survey. These selection lists may be summarized as follows:

September 10, 1965 .....	17,589.44 acres
February 8, 1966 .....	1,760.00 acres
May 17, 1967 .....	21,103.32 acres
October 20, 1967 .....	3,232.35 acres
November 2, 1967 .....	14,689.83 acres
December 19, 1969 .....	25,583.20 acres
February 17, 1970 .....	38,058.81 acres
November 8, 1971 .....	11,044.87 acres
November 15, 1971 .....	11,977.49 acres
November 19, 1971 .....	12,216.59 acres
<b>TOTAL .....</b>	<b>157,255.90 acres;</b>

and said selection lists are more particularly identified and described below:

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
1.	3842	UO147222	09/10/65	12/24E	640.00
2.	3843	UO147223	"	"	640.00
3.	3844	UO147224	"	"	640.00
4.	3845	UO147225	"	"	640.00
5.	3846	UO147226	"	"	623.52
6.	3847	UO147227	"	"	624.48
7.	3848	UO147228	"	"	640.00
8.	3849	UO147229	"	"	640.00
9.	3850	UO147230	"	"	640.00
10.	3851	UO147231	"	"	640.00
11.	3852	UO147232	"	"	640.00
12.	3853	UO147233	"	"	640.00
13.	3854	UO147234	"	"	640.00
14.	3855	UO147235	"	"	640.00
15.	3856	UO147236	"	"	640.00
16.	3857	UO147237	"	"	640.00
17.	3858	UO147238	"	"	640.00
18.	3859	UO147239	"	"	640.00
19.	3860	UO147240	"	"	625.48
20.	3861	UO147241	"	"	626.56
21.	3862	UO147242	"	"	640.00
22.	3863	UO147243	"	13S/24E	700.40
23.	3864	UO147244	"	"	693.72
24.	3865	UO147245	"	"	690.40
25.	3866	UO147246	"	"	688.37



## 58a

Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
26.	3867		"	680.75
27.	3868		"	635.76
28.	3869		"	120.00
29.	3892	02/08/66	"	640.00
30.	3893		"	640.00
31.	3894		"	480.00
32.	4018	05/17/65	9-10S/25E	641.72
33.	4019		10S/25E	677.65
34.	4020		"	655.11
35.	4021		"	644.53
36.	4022		"	640.00
37.	4023		"	640.00
38.	4024		"	640.00
39.	4025		"	640.00
40.	4026		"	653.37
41.	4027		"	640.00
42.	4028		"	640.00
43.	4029		"	640.00
44.	4030		"	640.00
45.	4031		"	640.00
46.	4032		"	640.00
47.	4033	05/17/67	10S/25E	640.00
48.	4034		"	640.00
49.	4035		11S/25E	640.00
50.	4036		"	637.59
51.	4037		"	640.00
52.	4038		"	649.62
53.	4039		"	640.00
54.	4040		"	647.98
55.	4041		"	640.00
56.	4042		"	640.00
57.	4043		"	640.00
58.	4044		"	640.00
59.	4045		"	640.00
60.	4046		"	640.00
61.	4047		11-12S/25E	640.00
62.	4048		12S/25E	663.64
63.	4049		"	542.11
64.	4075	10/20/67	13S/25E	640.00
65.	4076		"	655.92
66.	4077		"	640.00
67.	4078		"	648.92
68.	4079		"	647.51
69.	4080	11/02/67	"	632.80
70.	4081		"	640.00
71.	4082		12S/25E	640.00

## 59a

Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
72.	4083		"	640.00
73.	4084		"	640.00
74.	4085		"	640.00
75.	4086		"	640.00
76.	4087		"	640.00
77.	4088		"	640.00
78.	4089		"	640.00
79.	4090		"	640.00
80.	4091		"	640.00
81.	4092		"	638.44
82.	4093		"	639.38
83.	4094		"	639.59
84.	4095		"	640.00
85.	4096		"	632.46
86.	4097		"	640.00
87.	4098		"	640.00
88.	4099		"	640.24
89.	4100		"	640.00
90.	4101		"	639.65
91.	4102		"	627.27
92.	4147-A	12/19/69	10S/22E	640.00
93.	4148		"	640.00
94.	4149		10S/22-23E	640.00
95.	4150		10S/23E	646.40
96.	4151		"	640.00
97.	4152		"	640.00
98.	4153		"	640.00
99.	4154		"	640.00
100.	4155		"	640.00
101.	4156		"	640.00
102.	4157		"	640.00
103.	4158		"	639.20
104.	4159		"	639.84
105.	4160		"	640.00
106.	4161		"	640.00
107.	4162		10S/23-24E	640.00
108.	4163		10S/24E	640.00
109.	4164		"	640.00
110.	4165		"	640.00
111.	4166	12/19/69	10S/24E	640.00
112.	4167		"	640.00
113.	4168		"	640.00
114.	4169		"	640.00
115.	4170		"	640.00
116.	4171		"	640.00

## 60a

Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
117.	4172	U10474	"	640.00
118.	4173	U10475	"	637.40
119.	4174	U10476	"	640.00
120.	4175	U10477	"	640.00
121.	4176	U10478	"	640.00
122.	4177	U10479	"	640.00
123.	4178	U10480	"	639.08
124.	4179	U10481	"	640.00
125.	4180	U10482	"	640.00
126.	4181	U10483	"	640.00
127.	4182	U10484	"	640.00
128.	4183	U10485	"	640.00
			10S/24E & 11S/22E	640.00
129.	4184	U10486	"	621.28
130.	4185	U10487	"	640.00
131.	4186	U10488	"	640.00
132.	4187	U10895	02/17/70	640.00
133.	4188	U10894	"	640.00
134.	4189	U10896	"	645.79
135.	4190	U10897	"	623.21
136.	4191	U10873	"	640.00
137.	4192-A	U10874	"	639.84
138.	4195	U10875	"	639.48
139.	4198	U10877	"	639.31
140.	4199	U10878	"	613.44
141.	4200	U10879	"	640.00
142.	4201	U10884	"	630.77
143.	4202	U10885	"	631.73
144.	4203	U10886	"	640.00
145.	4204	U10887	"	640.00
146.	4205	U10888	"	640.00
147.	4206	U10889	"	640.00
148.	4207	U10890	"	627.88
149.	4208	U10891	"	640.00
150.	4209	U10892	"	640.00
151.	4210	U10893	"	640.00
152.	4211	U10898	"	525.02
153.	4212	U10899	"	605.00
154.	4213	U10900	"	640.00
155.	4214	U10901	"	640.00
156.	4215	U10902	"	640.00
157.	4216	U10903	"	640.00
158.	4217	U10904	"	602.09
159.	4218	U10905	"	640.00
160.	4219	U10906	"	640.00

## 61a

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
161.	4220	U10907	"	"	640.00
162.	4221	U10908	"	"	640.00
163.	4222	U10909	"	"	640.00
164.	4223	U10910	"	"	640.00
165.	4224	U10911	"	"	605.68
166.	4225	U10912	"	"	606.92
167.	4226	U10913	"	"	640.00
168.	4227	U10880	"	"	640.00
169.	4228	U10881	"	"	640.00
170.	4229	U10882	"	11S/24E	641.76
171.	4230	U10883	"	"	642.22
172.	4231	U10914	"	"	643.58
173.	4232	U10915	"	"	636.81
174.	4233	U10916	"	"	640.00
175.	4234	U10917	02/17/70	11S/24E	640.00
176.	4235	U10918	"	"	640.00
177.	4236	U10919	"	"	640.00
178.	4237	U10920	"	"	632.92
179.	4238	U10921	"	"	649.11
180.	4239	U10922	"	"	634.85
181.	4240	U10923	"	"	644.79
182.	4241	U10924	"	"	640.00
183.	4242	U10925	"	"	640.00
184.	4243	U10926	"	"	640.00
185.	4244	U10927	"	"	641.67
186.	4245	U10928	"	"	634.22
187.	4246	U10919	"	"	640.00
188.	4247	U10930	"	"	640.00
189.	4248	U10931	"	"	640.00
190.	4249	U10932	"	"	640.00
191.	4250	U10933	"	"	620.52
192.	4256	U16905	11/08/71	11S/24E & 12S/22-23E	11,044.87
193.	4257	U16942	11/15/71	12S/23-24- 25E	11,977.49
194.	4258	U16956	11/19/71	10S/25E, 11S/24-25E, 12S/24-25E & 13S/23E	12,216.59

*Finding No. 5:* Pursuant to an Agreement entered into between the State of Utah and the Secretary of Interior, the United States issued two proto-type oil

shale leases, pursuant to public bidding, embracing 10,240 acres within the lands selected by the State of Utah as above-described in Finding No. 4. Said Agreement was made and dated the 22nd day of February, 1974, before the present action was filed, but the actual leases were awarded and executed after this action was filed. The first lease is identified as Tract U-a, and aggregates 5,120 acres located in T. 10 S., R. 24 E., S.L.B. & M.; and the second lease is identified as Tract U-b, and aggregates 5,120 acres located partly in T. 10 S., R. 24 E., S.L.B. & M., and partly in T. 10 S., R. 25 E., S.L.B. & M. Pursuant to an Order to Show Cause duly requested by plaintiff State of Utah and issued by the Court, and after a hearing thereon, the Court ordered that all bonus funds and rental proceeds derived from those leases during the pendency of this action be paid into Court through the registry of the Court, and invested pursuant to appropriate procedures and safeguards, as set forth in the Orders issued by the Court governing such investments, until such time as the rightful owner of the lands and proceeds is ultimately and finally determined. As of May 25, 1976, the total principal sum of \$48,291,840.00 had been paid into Court and invested pursuant to such Orders, and an independent audit by the certified public accounting firm of Coopers & Lybrand submitted to the Court under date of September 8, 1975, reported that said funds were being duly invested pursuant to appropriate procedures and safeguards.

*Finding No. 5:* The defendant has taken no final, official action with respect to any of the selection lists

identified in Finding No. 4, above, despite the fact many of those selections have been pending for more than ten years; nor has the defendant offered any satisfactory explanation as to why he has failed to take action on such selection lists.

*Finding No. 6:* The selection lists filed by plaintiff, as identified in Finding No. 4, above, were for the purpose of exercising part of Utah's indemnity selection rights arising from the Utah Enabling Act, 28 Stat. 107, Act of July 16, 1894, and Sections 851 and 852, Title 43, United States Code. Section 6 of the Utah Enabling Act granted to Utah sections 2, 16, 32 and 36 within each township in Utah as a land grant for the support of Utah's public schools, and expressly provided that where:

. . . such sections, or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto . . . are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior . . . . (*Section 6, 28 Stat. 107, Act of July 16, 1894*).

Section 10 of the Utah Enabling Act further imposed trust restrictions on the school land grant by providing that:

. . . the lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund.



. . . (Section 10, 28 Stat. 107, Act of July 16, 1894).

*Finding No. 7:* The federal grant in trust to the State of Utah for the support of the public school system was accepted by the State by virtue of protective provisions and guarantees in the Utah Constitution. Section 3, Article X, Constitution of Utah, provides that:

The proceeds of the sales of all lands that have been or may hereafter be granted by the United States to this state, for the support of the common schools . . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only, shall be expended for the support of the common schools.

Further, Section 7, Article X, Constitution of Utah, provides that:

All public school funds shall be guaranteed by the State against loss or diversion.

*Finding No. 8:* Section 851, Title 43, United States Code, further grants and appropriates federal lands for lieu selection to indemnify States for original school land grants in place that are denied to the States by virtue of federal pre-emption or private entry, by providing that:

. . . other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers.

*Finding No. 9:* Section 852, Title 43, United States Code, sets forth the specific criteria and limitations that are applicable to school indemnity selections in exercise of the lieu land grants contained within state enabling acts and in Section 851 of Title 43, United States Code, the pertinent part of which is quoted in Finding No. 8, above. There is no present dispute between the parties as to whether Utah's school indemnity selection lists, as identified in Finding No. 4, above, are in accordance with the statutory criteria contained within Section 852. The Secretary of Interior has made no final determination with respect to such compliance. The parties have stipulated and agreed, in their Stipulation filed with the Court and dated June 10, 1975, that there are no material facts in controversy at this stage of the proceedings, and that the differences which separate the parties are purely questions of law.

*Finding No. 10:* The basic position of the State of Utah is that Congress has expressly granted and appropriated lands to Utah to be selected as indemnification for original school land grants that the State never received because of federal pre-emption or private entry prior to survey; that the right of selection is in the discretion of the State and not the Secretary of Interior; that upon filing school indemnity selection lists in accordance and compliance with Section 852, Title 43, United States Code, equitable title to the selected lands vests in the State; that the Secretary of Interior has a very narrow range of discretion in reviewing and acting on such selection lists, limited to

a ministerial adjudication to determine only whether such selection lists are in compliance with the statutory criteria of said Section 852; and, if so, the Secretary is obligated by law to approve said selections and to issue a clear list to the lands selected, thus vesting legal title in the State of Utah.

The Secretary of Interior, on the other hand, takes the position that he is authorized and obligated by Section 7 of the Taylor Grazing Act, codified as Section 315(f), Title 43, United States Code, to classify lands located within grazing districts to determine whether they are suitable for school indemnity selection and whether such disposition is appropriate under applicable public-land laws; and that, in making such classification, the Secretary is authorized in his discretion to utilize public interest criteria, including a comparison of the value of the base school lands for which selection is made and the value of the lands selected as indemnification; and, further, that classification in favor of disposition for school indemnity selection is a condition precedent to the vesting of any right, title or interest in any State which makes any such school indemnity selection.

*Finding No. 11:* The Taylor Grazing Act was enacted as Public Law No. 482, 73rd Congress, Second Session, identified as the Act of June 28, 1934, 48 Stat. 1269, entitled:

An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock in-

dustry dependent upon the public range, and for other purposes.

The pertinent part of Section 7 of the 1934 Act provided, with respect to the classification authority of the Secretary of Interior, that:

. . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area.

There is no language in the 1934 Act which purports to give the Secretary of Interior authority to classify lands that are selected by States for indemnification of lost school lands, nor is there anything in the legislative history of the 1934 Act that suggests that Congress intended to require classification as a condition to school indemnity selections.

*Finding No. 12:* The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 U.S.C. 315(f), describes the Secretary's classification authority in the following languages:

. . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than



for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4, above, are located within grazing districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections, as part of any classification procedure.

*Finding No. 13:* Plaintiff State of Utah contends that compliance by the Secretary with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, is not necessary in connection with the Secretary's action on the school indemnity selection lists, because such Act is inapplicable to such selections. Defendant Secretary of Interior contends that compliance with NEPA is necessary prior to such action because the Secretary has a broad range of discretion in classifying land under Section 7 of the Taylor Grazing Act.

*Finding No. 14:* Plaintiff State of Utah seeks (a) a declaratory judgment to the effect that equitable title to the selected lands vested in Utah at the dates of the respective filings of the selection lists, if such selection lists were in accordance and compliance with the applicable statutory requirements as set forth in Section 852, Title 43, United States Code; (b) a mandatory injunction requiring the Secretary to proceed forthwith and complete by a date certain his ministerial adjudication to determine whether the selection lists complied with the criteria contained in said Section 852, and to report that determination directly to the Court; and, (c) an order retaining custody, through the registry of the Court, of all funds now on deposit with and invested through the registry of the Court, and requiring all further proceeds from the proto-type oil shale leases to be paid into Court and invested in accordance with the present provisions and conditions governing such investments, as set forth in the applicable orders of the Court; and providing that such deposited and invested funds, together with all



interest earned thereon, be paid to the party entitled thereto when this litigation is fully concluded. Defendant Secretary of Interior opposes all relief sought by the State of Utah.

From the foregoing Findings of Fact, the Court now makes the following:

### CONCLUSIONS OF LAW

*Conclusion No. 1:* The jurisdiction of this Court is properly invoked under 28 U.S.C. 1331; venue is properly laid under 28 U.S.C. 1391(e)(3); and the relief sought by plaintiff, if otherwise appropriate, is available under 28 U.S.C. 1361, 5 U.S.C. 706(1) and 28 U.S.C. 2201 *et seq.*

*Conclusion No. 2:* The issues presently in dispute are purely questions of law, no material facts are in controversy, and the matters before the Court may properly be adjudicated and determined in summary judgment proceedings under Rule 56 of the Federal Rules of Civil Procedure.

*Conclusion No. 3:* Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by

the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and adopted by the people of the State of Utah.

*Conclusion No. 4:* When original school land grants in place are denied to the State of Utah as a result of federal pre-emption or private entry prior to survey, the State is entitled to select lands of equal acreage from otherwise unappropriated federal lands within the State, in lieu of and as indemnification for such lost base lands, pursuant to and in accordance with the criteria and limitations set forth in Section 852, Title 43, United States Code. This selection is to be made by the State in accordance with the congressional offer contained in said Section 852; and, when such selections are duly filed, it is the duty of the Secretary of Interior to make a ministerial adjudication of such selection lists to determine whether they are in accordance with the requirements of said Section 852. If so, the Secretary must honor the state's acceptance of the congressional offer, and thus fulfill the purpose of the public school land trust, by approving said selections; but, if such selections are found not to be in compliance with the congressional criteria contained in said Section 852, the Secretary must deny and reject such selection lists.

*Conclusion No. 5:* If the ministerial adjudication of the school indemnity selection lists, as conducted by the Secretary under said Section 852, reveals that said selection lists were in fact in compliance with said Section 852, then Utah would have acquired equit-

able title to the lands so selected as of the dates the respective selection lists were filed, and from and after that date Utah would have been entitled to all revenues, rentals, emoluments and benefits arising or accruing from said lands from and after the respective dates when such selection lists were filed.

*Conclusion No. 6:* The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), cannot reasonably be construed to require classification of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act.

*Conclusion No. 7:* Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secre-

tary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in



this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act.

*Conclusion No. 8:* Any and all regulations promulgated by the Secretary of the Interior inconsistent with these Conclusions of Law, and, in particular, any provisions within Part 2620 or Part 2400, 43 C.F.R., that purport to require classification under the Taylor Grazing Act of school indemnity selections filed under 43 U.S.C. 852, are without authority of law, are contrary to law, and are void and of no force or effect.

*Conclusion No. 9:* In view of the narrow, confined, ministerial range of discretion conferred on the Secretary under Section 852 of Title 43, U.S.C., and by Section 315f of Title 43, U.S.C. (if, indeed, the latter section could be construed to apply at all), the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, does not apply to secretarial review and action on school indemnity selection lists. The Secretary must approve those selections if they are in accordance with the congressional grant, appropriation and offer contained in the Utah Enabling Act, 28 Stat. 107, and Sections 851 and 852 of Title 43, U.S.C.

*Conclusion No. 10:* While federal land grants ordinarily are to be narrowly construed in favor of the United States and against the grantee, the reverse

rule holds true with respect to school land grants and indemnity selections. With respect to public school land grants and indemnity selections, the courts will adopt a liberal interpretation of the applicable statutes in order to honor and fulfill the public trust in aid support of the common schools, and thus achieve the purpose intended by Congress in granting school trust lands.

*Conclusion No. 11:* The Secretary's failure to take any final action on any of Utah's school indemnity selection lists which are the subject of this litigation, even though many of such selections have been pending before the Secretary for more than ten years, is "agency action unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1), Title 28, U.S.C.

*Conclusion No. 12:* Plaintiff State of Utah is entitled to judgment in this proceeding, as follows:

a. A declaratory judgment to the effect that equitable title to the selected school indemnity lands vested in the State of Utah at the dates of respective filings of the selection lists, as set forth in Finding of Fact No. 4, if it is determined by the Secretary that such selection lists were in accordance and compliance with the applicable statutory requirements as set forth in Section 852, Title 43, U.S.C.; and that, if such selection lists so complied with the statutory criteria of said Section 852, Utah is and has been entitled to all revenues, rentals, emoluments and benefits derived from said selected lands from and after the respective dates when such selection lists were filed.



b. A mandatory injunction requiring the Secretary to proceed forthwith and complete a ministerial adjudication by a date certain of Utah's school indemnity selection lists; and requiring the Secretary to conduct such administrative adjudication by confining his discretion to a determination as to whether the congressionally mandated criteria of Section 852, Title 43, U.S.C., have been complied with and satisfied by such selection lists.

c. An order retaining custody by the Court, through the registry of the Court, of all funds now on deposit and invested through the registry of the Court, as derived from the proto-type oil shale leases now in effect on part of the selected lands; and requiring all further proceeds from said oil shale leases to be paid into Court and invested in accordance with the present provisions and conditions governing such investments, as set forth in the applicable orders of the Court as previously made and entered; and providing that all such funds, together with all interest earned thereon, be paid to the party entitled thereto, pursuant to further order of the Court when this litigation is fully concluded on the merits.

From the foregoing Findings of Fact and Conclusions of Law, and in accordance therewith, the Court now makes the following:

#### JUDGMENT AND DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff State of Utah received equitable title to the 157,255.90 acres of school indemnity

lands selected in Uintah County, State of Utah, and identified and described in Finding of Fact No. 4, *supra*, at the dates that the respective selection lists were filed, if it is determined by the Secretary of the Interior that such selection lists were in accordance and compliance with the requirements of 43 U.S.C. 852.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the Secretary finds and determines that said selection lists were in compliance with 43 U.S.C. 852, so that Utah thus became the equitable owner of such lands at the dates that the respective selection lists were filed, that Utah thereupon became entitled, from and after such dates, to all revenues, rentals, emoluments and benefits derived from said selected lands.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of Interior should, and he is hereby Ordered to, proceed forthwith to conduct a ministerial, administrative adjudication, and to complete the same not later than December 15, 1976, of Utah's school indemnity selection lists; and, in so doing, to confine his administrative discretion to a determination as to whether those selection lists are in factual compliance with the requirements of 43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands; and, if the Secretary has not completed such ministerial adjudication of Utah's school indemnity selection lists by said date, he is

hereby Ordered to appear before this Court at 10:00 a.m. on said December 15, 1976, and then and there show cause, if any he has why he should not be held in contempt for failure to complete such ministerial adjudication of the school indemnity selection lists.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all regulations promulgated by the Secretary of Interior that purport to require classification under Section 7 of the Taylor Grazing Act (43 U.S.C. 315f) of lands selected in satisfaction of school indemnity rights filed by Utah under 43 U.S.C. 852, and, in particular, any provision within Part 2620 or Part 2400 of 43 C.F.R. that is so construed or interpreted by the Secretary, are, and are adjudicated and declared to be, without authority of law, contrary to law, and void and of no legal force or effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of the Interior shall, during the entire pendency of this action, deposit all rentals, bonus payments, and other proceeds and benefits of any kind and description, as and when received from the proto-type oil shale lessees, with the Court through the registry of the Court; that all such funds and proceeds heretofore deposited with the Court shall remain in the custody of the Court during the pendency of this action; that all funds previously deposited and invested will be periodically reinvested in accordance with the Order of this Court, and all funds hereafter deposited with the Court through the

registry of the Court shall be invested in accordance with the present provisions, conditions and safeguards as are set forth in the applicable orders of this Court as previously made and entered; and that all such funds, together with all interest earned thereon, shall be paid to the party entitled thereto pursuant to the further Order of this Court, when this litigation is fully and finally concluded on the merits.

Dated this 8 day of January, 1976.

By: /s/ Willis W. Ritter  
WILLIS W. RITTER  
Chief Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 76-1839

(D.C. No. C-74-64)

*AUGUST TERM—August 8, 1978*

Before Honorable Robert H. McWilliams, Honorable  
James E. Barrett, and Honorable William E. Doyle,  
Circuit Judges

THE STATE OF UTAH, by and through  
its Division of State Lands, PLAINTIFF-APPELLEE

*vs.*

THOMAS S. KLEPPE, individually and as  
Secretary of the United States  
Department of Interior, DEFENDANT-APPELLANT

JUSTHEIM PETROLEUM COMPANY,  
STATE OF IDAHO, AMICI CURIAE

## JUDGMENT

This cause came on to be heard on the record on ap-  
peal from the United States District Court for the  
District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the  
judgment of that court is affirmed.

/s/ Howard K. Phillips  
HOWARD K. PHILLIPS  
Clerk

## APPENDIX E

*NOVEMBER TERM—December 6, 1978*

Before Honorable Oliver Seth, Chief Judge, Honor-  
able William J. Holloway, Jr., Honorable Robert H.  
McWilliams, Honorable James E. Barrett, Honorable  
William E. Doyle and Honorable James K. Logan,  
Circuit Judges

No. 76-1839

THE STATE OF UTAH, by and through  
its Division of State Lands, PLAINTIFF-APPELLEE

*vs.*

THOMAS S. KLEPPE, individually and as  
Secretary of the United States  
Department of Interior, DEFENDANT-APPELLANT

JUSTHEIM PETROLEUM COMPANY,  
STATE OF IDAHO, AMICI CURIAE

This matter comes on for consideration of the peti-  
tion for rehearing with suggestion for rehearing en  
banc filed by the appellant.

Upon consideration whereof, the petition for re-  
hearing is denied by Circuit Judges McWilliams,  
Barrett and Doyle to whom the case was argued and  
submitted.

The petition for rehearing having been denied by  
the panel to whom the case was argued and submitted  
and no member of the panel nor judge in regular  
active service on the Court having requested that the  
Court be polled on rehearing en banc, Rule 35, Federal



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Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS  
Clerk

By: /s/ Robert L. Hoecker  
ROBERT L. HOECKER  
Chief Deputy

APPENDIX

Supreme Court, U.S.  
FILED

JUL 27 1979

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
*Petitioner*

—v.—

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED APRIL 5, 1979  
CERTIORARI GRANTED JUNE 11, 1979

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1522

---

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
*Petitioner*

—v.—

STATE OF UTAH

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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GENERAL DOCKET  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Civil Case No. 76-1839

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

See No. 75-1460, Lewis, Seth, Morris

JUDGE MC KAY IS RECUSED

THE STATE OF UTAH, by and through its Division of  
State Lands, PLAINTIFF-APPELLEE

vs.

CECIL ANDRUS, individually and as Secretary of the  
United States Department of Interior,  
DEFENDANT-APPELLANT

JUSTHEIM PETROLEUM COMPANY,  
STATE OF IDAHO, AMICI

ATTORNEYS FOR APPELLANT

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Raymond N. Zagone  
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Department of Justice  
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Washington, D.C. 20530

(1)

## ATTORNEYS FOR APPELLEE

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 Wayne L. Kidwell, Atty Gen.  
 Peter E. Heiser, Jr.  
 Chief Depty Atty General of Idaho  
 Guy G. Hurlbutt, Deputy Atty Gen. of Idaho  
 Statehouse  
 Boise, Idaho 83720

Amicus: Frank J. Allen  
 351 So. State Street  
 Salt Lake City, Utah 84111

NO. BELOW: C-74-64

JUDGE BELOW: Ritter

COURT REPORTER: Jenkinson

DATE OF JUDGMENT: 6/8/76

NOTICE OF APPEAL FILED: 8/2/76

ACTION COMMENCED: 3/4/74

vc	DATE	ACCOUNT OF APPELLANT
	9/14/76	U.S.A.

DATE	FILINGS—PROCEEDINGS
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9/14/76 Cause docketed; record on appeal, Vols. I, II (transcript) (105 pp.), Vol. III (pleadings) (115 pp.), orig. (220 pp.); docketing statement, orig. & 9 cc.

Appearance—appellant—Taft, Clark, Snel

9/16/76 Order—assigned to Calendar B; appellant's brief due 10/7/76—Lewis

9/22/76 Appearance—Appellee—Jensen, Dewsnup

9/27/76 *Record On Appeal*—Vols. I, II, III—3cc each

9/28/76 Appearance—Appellee—Ashton

10/8/76 Appellant's motion for ext. to 10-22-76 to file brief—O & 3 cc—c/s

10/08/76 Appellant's motion to supplement record on appeal O & 3cc—c/s (to C

Appellant Granted to 10-22-76 to file brief—HKP—csl. ntfd.

10/20/76 Order: The motion of appellant to supplement the record on appeal with the orders described in the motion and letter request is granted. The Clerk of the United States District Court for the District of Utah shall transmit certified copies of this material to this Court. (Lewis, McWilliams) cns. ntfd. District Court ntfd.

10/20/76 *Record on Appeal*—Supplemental I (Pleadings) (28 pp.), orig.

10/26/76 Appellant's motion for leave to file brief out of time—O & 3 cc—c/s

Order: Appellant GRANTED leave to file brief out of time—RLH—csl.

Appellant's brief—O & 9 cc—c/s (preliminary—replaced by copies rec'

10/28/76 Appearance—appellant—Zagone

11/3/76 *Record on appeal*—Supp. Vol. I—3 cc.

DATE	FILINGS—PROCEEDINGS
11/11/76	Appellant's brief (replacing preliminary copies) —O & 9 cc—c/s
11/12/76	Appellee's motion for ext. to 11-29-76 to file brief —O & 3 cc—c/s
11/16/76	Order: Appellee GRANTED to 11/29/76 to file brief—HKP—cnsl. ntfd.
11/15/76	Peninsula Mining, Inc. motion for leave to inter- vene or in the alternative to file brief amicus curiae and participate in oral argument—O & 4 cc—c/s (To Panel)
11/24/76	Motion for leave to interv. or in the altern. to file brief amicus curiae and participate in oral argument (To Alternative Panel)
12/1/76	Appellee's motion for leave to file brief containing 79 typewritten pages—O & 3 cc—c/s (To Panel)
12/1/76	Appellee's brief, 79 pgs. 0 & 9 cc—c/s
12/1/76	Order: The motion to intervene filed by Peninsula Mining, Inc., Clarence I. Justheim and Justheim Petro- leum Company is denied. (McWilliams, Doyle) cnsl. ntfd.
12/3/76	Appellee's statement in opposition to intervention or appearance as amici curiae by Peninsula Mining, Inc., et al, 0 & 3 cc—c/s
12/3/76	Order: Appellee's motion for leave to file brief con- taining 79 typewritten pages is granted. (McWilliams, Doyle) cnsl. ntfd.
12/14/76	Appellant's motion to ext. to 12-22-76 for reply brief, 0 & 3 cc, c/s.  Order: Appellant GRANTED to 12-22-76 to file brief, RLH, cnsl ntfd.
12/17/76	Justheim Petroleum's petition for reconsideration of denial of permission to file amicus curiae brief, 0 & 5 cc, c/s. (to Panel)

DATE	FILINGS—PROCEEDINGS
12/27/76	ORDER: Permission granted to Justheim Petro- leum Company to file amicus curiae brief, but not allowed participation in appeal.—all parties notified. (McWil- liams, Doyle)
12/22/76	Appellant's reply brief, 10 cc, c/s.
12/23/76	Response of Appellee to amicus curiae petition, 0 & 3 cc, c/s.
1/31/77	Brief of amicus curiae State of Idaho, 0 & 3 cc, c/s. 6 add'l. cc. rec'd. 2-7-77
2/25/77	Brief of Justheim Petroleum Co., amicus curiae, 11 cc. c/s.
3/3/77	Appellee's motion for leave to file reply brief, at- tached to reply brief (Panel)  Appellee's reply brief, 0 & 9 cc, c/s. (Panel-att'd to motion)
3/14/77	Order—Appellee is granted leave to file reply brief in response to appellant's reply brief—McWilliams, Doyle —Parties ntfd.
11/18/77	Set for December Special Session—Denver, Colo- rado
11/25/77	State of Idaho's motion for leave to present oral argument as amicus curiae—0 & 3 cc, c/s. (to panel 11/28/77)  Justheim Petroleum's motion for leave to present oral argument as amicus curiae—Orig. only, c/s. (to panel 11/28/77)
12/1/77	Appellant's supplemental authority—3 cc, c/s. (to panel)
12/2/77	Order: Upon consideration of the request of Justheim Petroleum for leave to make five minutes oral argument and the motion of the State of Idaho for just time to make oral argument, to motions are granted: to Justheim Petroleum Company to the extent of five min- utes argument; and to the State of Idaho to make argu- ment as permitted by the Court. (McWilliams)



DATE	FILINGS—PROCEEDINGS
12/14/77	argued and submitted—McWilliams, Barrett, McKay
1/9/78	Appellee's supplemental authorities—0 & 3 cc, c/s. (to panel)
4/4/78	Order: Upon the Court's own motion, the Court determines that the case must be reargued and resubmitted. It is therefore ordered: 1. The submission order of 12-14-77, is vacated. 2. Appeal is set for oral argument and submission to the Court in Div. I, at Denver, Colorado, on 4-20-78, at 10:00 a.m. 3. Counsel are not expected to submit additional briefs; but they may, if they desire, file any supplemental authorities which would brief the citations in their briefs up to date. (McWilliams, Barrett)
4/20/78	Argued and submitted—McWilliams, Barrett, Doyle
5/1/78	Appellant's supplemental authority, 0 & 1 cc, c/s (to panel 5/2/78)
6/30/78	Petition of Julius Petrofsky for leave to appear as amicus curiae, orig. & 3 cc., c/s (to panel 7/6/78)
8/8/78	OPINION—McWilliams, Barrett, Doyle—Publish Judgment: AFFIRMED
8/21/78	Appellant's mot for ext to 9/19/78 to file pet for rehearing en banc, 0 & 3 cc, c/s (to panel)
8/24/78	Order—petition of Julius Petrofsky for leave to appear as amicus curiae DENIED—McWilliams, Barrett, Doyle  Order—appellant GRANTED to 9/19/78 to file pet for rehearing—McWilliams, Barrett, Doyle
9/19/78	Appellant's unopposed motion to extend time for petitioning for rehearing en banc until 9/22/78, orig. & 3 cc., c/s—to panel
9/22/78	Appellant's petition for rehearing and suggestion for rehearing en banc, orig. & 9 cc., c/s—to panel

DATE	FILINGS—PROCEEDINGS
9/25/78	Order: Appellant GRANTED to 9/22/78 to file petition for rehearing en banc, McWilliams, Barrett, Doyle
10/10/78	Order: Appellee granted to 10/30/78 to file response to pet for rehearing and suggestion for rehearing en banc. McWilliams, Barrett, Doyle
10/23/78	Amicus Curiae's (Justheim) mot for leave to file memorandum, Orig only, c/s (to panel 10/24/78)
10/30/78	Appellee's response to appellant's pet for rehearing, 0 & 9 cc, c/s (to panel)
10/31/78	Amicus Curiae's (Justheim) letter in response to appellee's response to pet for rehearing, Orig. only, c/s (to panel)  Order: Justheim Petroleum GRANTED leave to file memo in opposition to rehearing. McWilliams, Barrett, Doyle
12/6/78	P.REHRG.ENB.DISP—Order denying appellant's petition for rehearing en banc by McWilliams, Barrett, Doyle
12/14/78	MDT.ISS—Mandate issued to district court
12/14/78	ROA.RTN.DC. <i>Record on appeal</i> to District Court. Vols. I,II Supplemental I.
12/21/78	MDT.RECPT.F—mandate receipt filed
12/22/78	ROA.RECPT.F—receipt for original record filed
4/9/79	P.WRIT.CERT.F—appellant's petition for writ of certiorari filed 4/5/79—Supreme Court No. 78-1522

CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Willis W. Ritter, Judge

Alan Jenkinson, Court Reporter

Jury demand date:

THE STATE OF UTAH, by and through  
its Division of State Lands

—vs.—

THOMAS S. KLEPPE, individually and as Secretary of the  
United States Department of the Interior

and

FRANK E. MOSS, K. GUNN MC KAY AND WAYNE OWENS,  
as Intervenors on behalf of plaintiff,

PLINTIFFS IN INTERVENTION

DATE	PROCEEDINGS
3/4/74vj	Verified Complaint filed. Summons issued.
3/4/74vj	Order to Show Cause on 3/22/74 at 10:00 A.M. filed.
3/22/74vj	Plaintiff's Memorandum re proposed escrow order filed.
3/22/74vj	Came on before the court on 3/22/74 on order to show cause. Pltf to prepare appropriate order re depositing monies from shale oil projects for approval by court and def.
3/26/74ds	Marshal's returns filed showing summons and order to show cause served on C Nelson Day 3-4-74, Attorney General USA 3-4-74; Rogers C. B. Morton 3-18-74.

DATE	PROCEEDINGS
4/5/74sb	Order Requiring Impoundment of Funds, signed by Judge Ritter 4-5-74. Notice mailed, ruled 77(d)
4/19/74sb	SUPPLEMENTAL ORDER, for Investment of Impounded Funds, signed by Judge Ritter 4/19/74, filed. Notice of Rule 77(d) mailed.
4/22/74kl	Supplemental Order for Investment of Impounded Funds, signed by Judge Ritter 4/22/74. Notice mailed, Rule 77(d).
4/22/74sb	Letter written by Verl C. Ritchie to First Security Bank of Utah, and Walker Bank and Trust Company, Re: C 74-64, filed.
4/24/74sb	ORDER, Confirming Investment of Impounded Funds, signed by Judge Ritter 4/24/74, filed. Notice of Rule 77(d) mailed.
5/3/74kl	Answer to complaint filed.
5/16/74sb	Supplemental Order for Investment of Impounded Funds, signed by Judge Ritter 5/16/74, filed. Notice of Rule 77(d) mailed.
5/29/74kl	Complaint of Intervenors, filed.
5/29/74kl	Memorandum in Support of Motion to Intervene, filed.
5/29/74kl	Application of Frank E. Moss, K. Genn Mackay and Wayne Owens for Permission to Intervene as Parties Plaintiff or in the Alternative to File a Brief as Amicus Curiae, filed.
6/7/74sb	Notice of Hearing on Friday, June 14, 1974 at 10:00 a.m. on Application of Frank Moss, K. Gunn Mackay & Wayne Owens for Permission to Intervene as Parties Plaintiff or in Alternative, to File a Brief as Amicus Curiae, mailed.
6/14/74vj	This matter vacated from the calendar and continued to next rule day.

DATE	PROCEEDINGS
6/21/74sb	Notice of Hearing on Application of Frank Moss, K. Gunn MacKay & Wayne Owens for Permission to Intervene as Parties Pltf or in alternative to File Brief as Amicus Curiae, on Friday, June 28, 1974 at 10:00 A.M. mailed.
6/28/74ds	Ed Clyde granted leave to file amicus curiae brief.
6/28/74kl	Order Granting Petition for Leave to Appear As Amicus Curiae, filed. Notice 77(d) mailed.
7/25/74ds	This matter came before the court uncalendared re reinvestment of money deposited in registry of the court. Money to be reinvested in compliance with previous order of the court.
9/5/74sb	Pretrial notice mailed.
10/24/74sb	Pursuant to the stipulation and good cause appearing, the Clerk is directed to provide to Walker Bank and Trust Company the funds now or hereafter in the Registry of the Court in this case for investment in ninety day U. S. Treasury Bills under and in conformity with the prior order of the Court in this case and the Agreement of Walker Bank and Trust Company executed in conformity, therewith, signed by Judge Ritter, 10/24/74. Notice of Rule 77(d) mailed.
2/28/75sb	Peninsula Mining, Inc., Clarence I. Justheim, and Justheim Petroleum Company, Petitioners' Motion for Leave to Intervene, filed.
3/13/75sb	Notice mailed of Hearing of Petitioner's Peninsula Mining, Inc., Clarence I. Justheim & Justheim Petroleum Co.'s Motion for Leave to Intervene, on Tuesday, March 25, 1975 at 10:00 A.M. mailed.
3/24/75sb	Defendant's Memorandum of Points and Authorities in Opposition to Motion to Intervene, filed.
3/25/75vj	Came on for hearing as calendared. Petitioner's motion for leave to intervene was denied.

DATE	PROCEEDINGS
3/26/75sb	Order Denying Motion to Intervene, signed by Judge Ritter, 3/26/75. Notice of Rule 77(d) mailed.
4/17/75sb	Plaintiffs in Intervention's Motion for Leave to Amend Complaint in Intervention and for Re-Argument of Motion for Leave to Intervene, filed, and DENIED by Judge Ritter, 4/18/75. Notice of Rule 77(d) mailed.
4/21/75sb	Motion and Order Denying Renewed Motion to Intervene, signed by Judge Ritter 4/21/75. Notice of Rule 77(d) mailed.
5/23/75sb	Notice of Appeal, filed.
5/23/75sb	Undertaking for Cost on Appeal Bond, United Pacific Insurance Company, in the amount of \$250.00 filed.
5/27/75rb	Notice mailed to counsel on filing of Notice of Appeal.
5/29/75vj	Pretrial notice mailed.
6/12/75vj	Supplemental Order Providing for Investment of Funds Deposited with the Court signed by Judge Ritter on 6/12/75 filed. Notice mailed, rule 77(d).
6/16/75sb	Motion and Order that Stanley K. Hathaway be substituted as the Defendant in this action, personally and in his capacity as Secretary of the United States Department of the Interior, in the place and stead of Rogers C. B. Morton, who has resigned his position as Secretary of the Interior, signed by Judge Ritter 6/16/75. Notice of Rule 77(d) mailed.
6/16/75sb	Stipulation and Pretrial Order signed by Judge Ritter, 6/16/75. Notice of Rule 77(d) mailed.
6/24/75rb	Record on Appeal mailed to Tenth Circuit Court of Appeals consisting of Volumes I & II.
7/18/75sb	Plaintiff's Motion for Summary Judgment filed.
7/18/75sb	Defendant's Motion for Summary Judgment filed.



DATE	PROCEEDINGS
8/18/75vj	Stipulation and Order for Audit of Funds deposited with the Court signed by Judge Ritter on 8/18/75. Notice mailed, Rule 77(d).
8/18/75vj	Letter to Judge Ritter from Messrs. Ashton, Dewsnap, Jensen and Child re stipulation and order for audit of funds deposited with the court filed.
8/25/75sb	Certificate of Service to Defendant's Motion for Summary Judgment, filed.
9/15/75hs	Memorandum of Points and Authorities in support of defendant's motion for summary judgment filed.
9/15/75hs	Supplemental Affidavit of Donald G. Prince in support of plaintiff's motion for summary judgment filed.
9/19/75hs	Letter to Court dated 9/15/75 filed.
9/19/75hs	Memorandum in support of Plaintiff's motion for summary judgment filed.
10/15/75sb	Memorandum of Plaintiff in Answer to Memorandum of Defendant, filed.
10/17/75sb	Defendant's Answering Memorandum, filed.
11/8/76sb	Order Authorizing Payment for Audit, signed by Judge Ritter, 1/8/76. Notice of Rule 77(d) mailed.
1/22/76sb	Order that the Clerk of the Court is hereby directed and authorized to provide to Walker Bank and Trust Company the "residual funds" now or hereafter remaining in the registry of the court in this case for investment in ninety-day United States Treasury Bills under and in conformity with the prior orders of this court and in accordance with the agreement of Walker Bank and Trust Company, and that the Federal Reserve Branch shall hold such treasury bills for the court as a customer of said bank, signed by Judge Ritter, 1/22/76. Notice of Rule 77(d) mailed.

DATE	PROCEEDINGS
2/19/76hs	Notice mailed for hearing on Wednesday, February 25, 1976 at 10:00 a.m. on (1) Pltf's motion for summary judgment and (2) Def's motion for Summary Judgment.
2/13/76sb	ORDER that Thomas S. Kleppe should be and is hereby substituted as the party defendant in the place and stead of Stanley K. Hathaway, signed by Judge Ritter, 2/12/76. Notice of Rule 77(d) mailed.
2/25/76hs	Came on for hearing on 2/25/76 on (1) Pltf's motion for summary judgment and (2) Def's motion for summary judgment. Arguments of counsel were heard. Court directed that the plaintiff prepare an appropriate order providing for the relief asked for and also to file a memorandum in depth, precise and definity to his evidence; said memorandum due in 20 days; defendants allowed 20 days thereafter in which to file its reply memorandum.
4/5/76sb	ORDER that the foregoing Stipulation for Extension of Time for Filing Defendant's Reply Memorandum is hereby approved and that the defendant may have to and until the 16th day of April, 1976, to file its Reply to Plaintiff's Supplemental Memorandum of Law filed Herein, signed by Judge Ritter, 4/5/76. Notice of Rule 77(d) mailed.
4/7/76sb	Letter from Louis Ferandez to Clerk of Court requesting to be notified of any further action to be taken in this matter, filed.
4/19/76sb	Defendant's Supplemental Memorandum of Law, filed.
5/20/76hs	Notice mailed for Oral Arguments and Ruling of Court on each party's motions for summary judgment on Tuesday, May 25, 1976 at 10:00 a.m.
5/25/76hs	Came on for hearing on 5/25/76 for Rule of Court —motions for Summary Judgment as filed by parties. Court found for the plaintiff. Appropriate order to be filed by Mr. Dewsnap.

DATE	PROCEEDINGS
6/3/76hs	Notice mailed for hearing on 6/10/76 on Disposition of Crosby matter and further status report on case.
6/2/76sb	ORDER Providing for Investment of Funds Deposited with the Court, signed by Judge Ritter, 6/2/76. Notice of Rule 77(d) mailed.
6/10/76sb	Letter to Judge Ritter from Richard L. Dewsnup, filed.
6/8/76sb	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE signed by Judge Ritter, 6/8/76. Notice of Rule 77(d) mailed.
6/8/76sb	ORDER for Issuance of Checks for Investment of Funds Deposited with the Court, signed by Judge Ritter, 6/8/76. Notice of Rule 77(d) mailed.
7/1/76sb	Receipt, filed.
7/1/76sb	ORDER for Issuance of Check for Investment of Funds Deposited with the Court, signed by Judge Ritter, 7/1/76. Notice of Rule 77(d) mailed.
7/16/76sb	Order of Dismissal of Appeal by Tenth Circuit Court of Appeals, filed. Constituting Filing of Mandate, filed.
8/2/76sb	NOTICE OF APPEAL, filed.
8/2/76rb	Notice mailed to counsel re filing of Notice of Appeal.
8/3/76sb	Notice mailed of Filing of Mandate 8/16/76 at 2:00 P.M.
8/16/76hs	Came on for filing of mandate on 8/16/76. There being no objections, court directed that mandate be filed.
8/16/76hs	Mandate filed.
9/7/76sb	Transcript of Proceedings of February 25, 1976, filed.
9/7/76sb	Transcript of Proceedings of May 25, 1976, filed.

DATE	PROCEEDINGS
9/10/76rb	Record on Appeal mailed to Tenth Circuit.
9/20/76sb	Copy of Letter to Dirk D. Snel, Esq., from Tenth Circuit, Re: Appeal, filed.
9/27/76sb	Copy of Letter Re: Return of Record on Appeal to Tenth Circuit from Supreme Court.
10/5/76rb	Record on Appeal returned from Tenth Circuit (First Appeal)
10/7/76sb	Def's Motion for Stay of Injunction Pending Appeal, filed.
10/7/76sb	Affidavit of Paul Howard, filed.
10/7/76rb	Letter dated October 5, 1976 filed to Clerk from Dirk D. Snel, Atty. Appellate Section, Dept. of Justice, requesting supplemental record. Copy of Appellant's Motion to Supplement Record on Appeal directed to Tenth Circuit.
10/18/76rb	Supplemental Record on Appeal mailed to Tenth Circuit.
10/18/76hs	Order for issuance of check for investment of funds deposited with the court, with stipulation thereto signed by Judge Ritter on 10/18/76 and filed.
10/18/76hs	Order granting partial stay of injunction pending appeal, with Plaintiff's consent thereto signed by Judge Ritter on 10/18/76 and filed.
10/19/76hs	Notice mailed, Rule 77(d) on orders under date of 10/18/76.
10/19/76hs	Received of Walker Bank and Trust Company filed.
10/21/76sb	Copy of Order requesting Supplemental Record by the Tenth Circuit Court of Appeals.
2/4/77sb	ORDER for Issuance of Check for Investment of Funds Deposited with the Court signed by Judge Ritter, 2/3/77. Notice of Rule 77(d) mailed.

DATE	PROCEEDINGS
7/1/77sb	ORDER For Issuance of Check for Investment of Funds Deposited with the Court signed by Judge Ritter, 7/1/77. Notice of Rule 77(d) mailed.
6/7/78sb	ORDER FOR ISSUANCE OF CHECK FOR INVESTMENT OF FUNDS DEPOSITED WITH THE COURT signed by Judge Anderson, 6/7/78. Notice of Rule 77(d) mailed.
10/19/78sb	ORDER for Issuance of Check for Investment of Funds Deposited with the Court signed by Judge Anderson 10/19/78. Copies mailed to counsel.
12/18/78sb	Certified Copy of the Judgment and a copy of the Opinion of the Tenth Circuit AFFIRMING the Decision of the District Court.
1/8/79sb	Notice mailed of Filing of Mandate as of 1/8/79.
4/12/79ds	Petition for Writ of Certiorari filed on April 5, 1979 with Supreme Court of the U.S.
5/29/79ds	Stipulation re investment of accumulated sums. Order for Issuance of Check for Investment of Funds Deposited with the Court, signed by Judge Anderson, 5-29-79. Copy mailed to counsel.
	Receipt signed by Walker Bank & Trust Co.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

Civil No. C-74-64

THE STATE OF UTAH, by and through its Division of  
State Lands, PLAINTIFF

v.

ROGERS C. B. MORTON, individually and as Secretary of  
the United States Department of the Interior, DEFENDANT

VERIFIED COMPLAINT

[Filed Mar. 4, 1974]

Plaintiff alleges that:

1. Plaintiff has the statutory responsibility, acting for and in behalf of the State of Utah, to manage and administer all lands received by the State of Utah under the school land grants from the United States, including those lands which are the subject of this litigation; Defendant Rogers C. B. Morton is the Secretary of the Department of the Interior of the United States of America, with authority to administer federal public lands.

2. Jurisdiction of this Court is invoked under 28 U.S.C. 1361 (mandamus) and 28 U.S.C. 1331 (federal question); and venue is properly laid under 28 U.S.C. 1391(e)(3) in that the real property subject to this action is located within Uintah County, State of Utah, and thus within the geographic jurisdiction of the Central Division of this Court. This action is further prosecuted pursuant to the provisions of the Administrative Procedures Act, 5 U.S.C. 701 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*



3. The amount in controversy, exclusive of interest, attorneys' fees and costs, exceeds \$10,000.00.

4. By virtue of the provisions of the Utah Enabling Act (28 Stat. 107, July 16, 1894), the United States granted to Utah sections 2, 16, 32 and 36 within each township as a land grant for the support of common schools, and where:

such sections, or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto . . . . are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior . . . (Section 6, 28 Stat. 107, July 16, 1894).

By Section 10 of said Enabling Act, it was provided "that the lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund," thus creating a permanent trust for the benefit of public education and the common schools. Utah complied with and honored this trust, by providing in Article X, Section 3, Constitution of Utah, that:

The proceeds of the sales of all lands that have been or may hereafter be granted by the United States to this state, for the support of the common schools . . . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only, shall be expended for the support of the common schools.

and further, by providing in Section 7 of said Article X that: "All public school funds shall be guaranteed by the State against loss or diversion."

5. The Act of May 3, 1902 (32 Stat. 188. 189; 43 U.S.C. 853) expressly made the Act of February 28, 1891 (43 U.S.C. 851) applicable to the State of Utah, thus clearly authorizing Utah to make school indemnity selections in lieu of sections 2, 16, 32 and 36 in all in-

stances where said sections were appropriated for other purposes, and where Utah thus did not receive the school lands to which it was entitled under the statutory grant. Said Section 43 U.S.C. 851 expressly provides that all such school indemnity selections shall be made on the basis of "equal acreage;" and that all such selections shall be made in accordance with the provisions of 43 U.S.C. 852. Said Section 852 provides, among other things, that school indemnity selections may include lieu lands that are mineral in character where the base lands for which selection is made are mineral in character.

6. By September 10, 1965, there were within the State of Utah more than 160,000 acres of school sections in place, mineral in character, to which the State was denied title for one cause or another, and for which no school indemnity selections had then been made. Thereafter the State of Utah, beginning on said date of September 10, 1965, made school indemnity selections from federal lands which the State Director of the Bureau of Land Management and his staff reported to be available for school indemnity selections by the State of Utah as mineral lands in lieu of school sections, also mineral in character, to which the State had not received title under the statutory grant. These selections covered lands located within Uintah County, State of Utah, and were duly and regularly filed with the Bureau of Land Management under Sections 2275 and 2276 of the Revised Statutes (43 U.S.C. 851, 852) on the following dates for the amounts of land indicated:

September 10, 1965	17,589.44 acres
February 8, 1966	1,760.00 acres
May 17, 1967	21,103.32 acres
October 20, 1967	3,232.35 acres
November 2, 1967	14,689.83 acres
December 19, 1969	25,583.20 acres
February 17, 1970	38,058.81 acres
November 8, 1971	11,044.87 acres
November 15, 1971	11,977.49 acres
November 19, 1971	12,216.59 acres
TOTAL	<u>157,255.90 acres;</u>

and said selection lists are more fully explained and the land covered thereby more fully described in Exhibit A<sup>1</sup> which is attached hereto and by this reference is incorporated as a part of this Complaint.

7. The Act of June 24, 1966 (80 Stat. 220, 43 U.S.C. 582(a)) authorized school indemnity selections "of tracts of reasonable size, taking into consideration, location, terrain, and adjacent land ownership and uses." Plaintiff, in consultation and cooperation with the State Director of the Bureau of Land Management, made most of the selections alleged above after said date of June 24, 1966, in accordance with recommendations of said State Director, in the vicinity of numbered school sections in place in Uintah County to which Utah had received title under the statutory grant. These selections thus made in consultation with said Bureau of Land Management were to assure compliance with said Section 852(a) and to assure that the selections previously filed by Plaintiff were likewise in compliance with all applicable requirements of law. The school indemnity selection lists so filed were examined by the State Director and his Staff in the Bureau of Land Management, and were found to be proper selections of indemnity lands, and said selection lists were thus forwarded to the Bureau of Land Management and to the Secretary of the Interior in Washington, D.C., for final examination and action required by law.

8. The lands selected by Plaintiff as alleged above were available for selection under said Sections 851, 852 and 852(a), Title 43, United States Code, and the base lands for which selection was made were mineral in character as required by said Section 852; and the selections further were in compliance with all applicable provisions of said statutes. As a result thereof, Plaintiff obtained equitable title to the subject lands covered within each school land indemnity selection list as of the date such indemnity selection list was filed; and Plaintiff thus became entitled to a transfer of legal title

<sup>1</sup> Exhibit A is omitted. The selection lists described therein are set forth in Finding No. 4 of the district court (Pet. App. C 57a-61a).

to said lands by appropriate action of Defendant, without unreasonable delay.

9. Defendant, acting in his official capacity, has unlawfully withheld and unreasonably delayed acting on such indemnity selections and the transfer of legal title to the subject lands to which Plaintiff is entitled as a matter of law. Defendant advised the State of Utah by letter dated February 14, 1974, that said indemnity selections will not be acted upon until a determination has been made as to whether the base lands for which selection was made are of comparable value with the lieu lands selected; and that if the lieu lands selected are found to have a greater value than the base lands, so that there is a grossly disparate value between the base lands and the lieu lands selected, the selections will not be approved.

10. The Defendant has no authority under the law to conduct a study of the relative values of the base lands and the lieu lands selected, nor to substitute a requirement of "comparable value" for equal acreage, but is empowered to determine only whether the base lands and the lieu lands are both mineral in character and whether the selection applications otherwise are in compliance with law. If so, Defendant is obligated by law to approve the selections without further delay and make the appropriate transfer forthwith on an acre-for-acre basis to the State of Utah.

11. The conduct of Defendant in unreasonably delaying and refusing to approve transfer of legal title to the lieu lands selected by Plaintiff is clearly in excess of and contrary to his statutory authority; without any authority of law whatsoever; and is (a) constituting a breach of the school land trust which Congress granted and created for the benefit of Utah's public schools, (b) causing Plaintiff to suffer legal wrong as a result of such unlawful action, (c) unlawfully withholding and unreasonably delaying Plaintiff's entitlements under the selection applications, (d) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and (e) short of any statutory right.



12. Defendant has initiated a proto-type oil shale leasing program, pursuant to which two tracts located within Utah, and within the lieu lands selected by Plaintiff, have been identified and scheduled for competitive leasing for oil shale, as follows: Tract U-a, containing 5,120 acres, is scheduled for the opening of competitive bids on March 12, 1974; and Tract U-b, consisting of 5,120 acres, is scheduled for opening of competitive bids on April 9, 1974.

13. It is expected that bids will be submitted on the tracts mentioned above, and said bids must include deposits of annual rentals for the first year under any lease that would be awarded to the successful bidder, plus an amount of bonus money to be paid for the privilege of obtaining the lease; and that these funds will thus come within the custody of Defendant on the bid dates indicated above; but that in fact Plaintiff as a matter of law will be the equitable owner of said funds since they will be derived from lease rights on the land of which Utah is the equitable owner.

14. Plaintiff does not seek to enjoin or delay competitive leasing of the two tracts identified above, and interposes no objection to the issuance of leases under said prototype leasing program to cover the two tracts above described; but alleges that any such acts will be, in legal effect, as trustee for the State of Utah, and that when Plaintiff obtains legal title to the subject lands, Plaintiff will accept an assignment of any leases awarded on said lands pursuant to the proto-type leasing program, and will honor all terms and conditions of said leases to the same extent as if Plaintiff had been the original lessor; however, Plaintiff alleges that after Defendant determines the successful bidder, if any, as to each of the two tracts and makes an award of lease for each tract, that the sums paid by the successful bidder for each tract should forthwith be deposited into Court, thereupon to be deposited in an interest-bearing account under the direction of the Court until Plaintiff's rights and entitlements are determined herein, and that said funds then be distributed in accordance with an appropriate Order of the Court.

15. Unless the Court issues its Order requiring such funds to be paid to the Clerk of the Court, Plaintiff is fearful that said funds will be deposited in the United States Treasury and that Plaintiff will thereafter be unable to recover said funds expeditiously, if at all, and that Plaintiff would thus suffer immediate and irreparable injury and damage unless the Court issues such Order.

WHEREFORE, Plaintiff prays for relief against Defendant as follows:

A. For a declaratory judgment and decree, adjudicating that as a result of the school indemnity selection lists duly filed by Plaintiff, Plaintiff became the equitable owner of the 157,255.90 acres of land which is the subject of this action, and is entitled to a prompt approval of the selection lists on file for said lands, and for a prompt conveyance of legal title to the same to Plaintiff;

B. For an Order in mandamus requiring Defendant to approve forthwith Plaintiff's school indemnity selection lists and to transfer legal title to the subject lands to Plaintiff;

C. For an Order to Show Cause, requiring Defendant or his duly authorized representative to appear before this Court on a day and time certain and prior to the scheduled bid opening on March 12, 1974, and to then and there show cause, if any he has, why a preliminary injunction should not issue forthwith requiring Defendant to deposit with the Clerk of the Court all lease rentals and bonus proceeds received from the successful bidders on the oil shale leases for the two proto-type tracts located in Utah and within the lieu lands selected by Plaintiff; and further requiring that said funds be properly invested in interest-bearing accounts during the pendency of this action, with said principal sums and interest accumulated thereon to be paid and distributed in accordance with the final decree of the Court in this action;

D. For costs incurred in this action, and for such other relief as shall appear to be appropriate in the premises.



Dated this 11th day of March, 1974.

/s/ Vernon B. Romney  
 VERNON B. ROMNEY  
 Utah Attorney General  
 236 State Capitol Building  
 Salt Lake City, Utah 84114  
 Telephone: 328-5261

PAUL E. REIMANN  
 WILLIAM T. EVANS  
 DALLIN W. JENSEN  
 Assistants Attorney General

RICHARD L. DEWSNUP  
 CLIFFORD L. ASHTON  
 MARVIN J. BERTOCH  
 Special Assistants

# VERIFICATION

STATE OF UTAH                    )  
   ) SS.  
 COUNTY OF SALT LAKE        )

CHARLES R. HANSEN, being first duly sworn upon oath, says that he is the Director of the Division of State Lands of the State of Utah, and that he has read the foregoing Complaint and is familiar with the contents thereof, and that to the best of his knowledge, information and belief all of the allegations of fact contained therein are true.

/s/ Charles R. Hansen  
 CHARLES R. HANSEN  
 Director  
 Utah Division of State Lands

Subscribed and sworn to before me this 28th day of February, 1974.

/s/ Lynda Belnac  
 Notary Public

My Commission Expires: 11-1-77

Residing in Salt Lake City, Utah

## ANSWER

[Filed May 3, 1974]

Defendant Rogers C. B. Morton, Secretary of the Interior, answers the verified complaint as follows:

*First Defense*

The Court lacks jurisdiction of the subject matter.

*Second Defense*

The complaint fails to state a claim upon which relief can be granted.

*Third Defense*

1. The allegations in the first clause of paragraph 1 are conclusions of law which require no answer. Defendant admits the remaining allegations in paragraph 1.

2. Defendant admits that the real property involved in this action is located within Uintah County, State of Utah. The remaining allegations in paragraph 2 are conclusions of law which require no answer.

3. Defendant admits the allegation in paragraph 3.

4 and 5. Defendant admits the allegations in paragraphs 4 and 5 but affirmatively alleges that the cited statutes and constitutional provisions are the best evidence as to their terms.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 6. Defendant denies that the State Director of the Bureau of Land Management and his staff reported that the lands applied for by plaintiff as base lands for the selections are mineral in character. Defendant admits the remaining allegations in paragraph 6.

7. The allegation in the first sentence of paragraph 7 is a conclusion of law which requires no answer. Defendant admits that part of plaintiff's selections were made after June 24, 1966, and that the school indemnity selection lists were examined by the State Director of the Bureau of Land Management and his staff and reported

to the Director of the Bureau of Land Management and the Secretary of the Interior for action. Defendant denies the remaining allegations in paragraph 7.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the base lands for which selection was made were mineral in character. Defendant denies the remaining allegations in paragraph 8.

9. Defendant denies the allegations in the first sentence of paragraph 9. Defendant admits that the allegations in the second sentence of paragraph 9 are substantially correct but affirmatively alleges that defendant's letter of February 14, 1974, is the best evidence as to its contents.

10. The allegations in paragraph 10 are conclusions of law which require no answer but which defendant nevertheless denies.

11. The allegations in paragraph 11 are conclusions of law which require no answer but which defendant nevertheless denies.

12. Defendant admits the allegations in paragraph 12.

13. Defendant admits the allegations in the first clause of paragraph 13 but denies the remaining allegations in that paragraph.

14. Defendant denies that the leasing of oil shale lands by defendant "will be, in legal effect, as trustee for the State of Utah." Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first sentence of paragraph 14. The allegations in the second sentence of paragraph 14 require no answer in light of the Court's orders of April 5 and 22, 1974, requiring the impoundment of lease rental proceeds.

15. The allegations in paragraph 15 require no answer in light of the Court's orders of April 5 and 22, 1974.

Defendant denies every allegation of the complaint which is not expressly admitted.

WHEREFORE, defendant respectfully requests that the complaint be dismissed and that defendant be awarded his costs.

/s/ C. Nelson Day  
C. NELSON DAY  
United States Attorney  
200 U.S. Post Office and  
Court House  
350 South Main  
Salt Lake City, Utah 84101  
Telephone: (801) 524-5685

Attorney for the Defendant

## STIPULATION AND PRE-TRIAL ORDER

[Filed June 16, 1975]

The parties hereby stipulate to the following as the Pre-Trial Order in this case, and respectfully request the Court to approve and adopt the same.

### 1. *Jurisdiction.*

Plaintiff alleges jurisdiction under 28 U.S.C. 1331 and 1361. Without admitting that this is a proper action in mandamus under 28 U.S.C. 1361, defendant admits the Court's jurisdiction of the action for the limited purpose of ruling on issues of law, hereafter to be identified, with respect to which a judicial interpretation of the law at this time would be in the interest of administrative and judicial economy.

### 2. *Amendments to pleadings.*

None.

### 3. *Preliminary motions remaining to be determined.*

No preliminary motions pending. The parties request leave to file, within 60 days from the date of the pre-trial order, their respective disposition motions and request that further trial proceedings, including discovery, be stayed pending the Court's ruling on such motions.

### 4. *General nature of the claims of the parties.*

(a) *Plaintiff's claim:* Plaintiff seeks a judicial determination that:

(1) As a result of certain school indemnity selection lists filed by plaintiff, in accordance with applicable statutory requirements and criteria, plaintiff became the equitable owner of 157,255.9 acres of land in the State of Utah described in those lists;

(2) Defendant is required by law forthwith to approve plaintiff's selections and to transfer legal title to the selected lands to the State of Utah.



(b) *Defendant's claim:*

(1) Before any right to specific land can vest in plaintiff pursuant to the filing of a school indemnity selection list, the selected land must be classified by the Secretary of the Interior, pursuant to section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, as suitable for disposition in satisfaction of plaintiff's claim to indemnification for lost school grant lands;

(2) Disparity in the value of selected lands and the lost school grant lands which are offered as base for the selections is a factor properly to be weighed by the Secretary of the Interior in determining whether the selected lands are suitable for disposition in satisfaction of a state's claim to indemnification for lost school lands; and

(3) Irrespective of the foregoing issues, plaintiff is precluded from seeking affirmative judicial relief until such time as it has exhausted its administrative remedies.

5. *Uncontroverted facts.*

The following material facts are established by admissions in the pleadings or by stipulation of counsel:

(a) Between September 10, 1965, and November 19, 1971, plaintiff filed in the Department of the Interior 194 school indemnity selections pursuant to 43 U.S.C. 851, 852 and 852(a). These selections covered 157,255.9 acres of land in Uintah County, Utah and were filed in lieu of, and as indemnification for, an equal acreage of school sections in place to which plaintiff would have been entitled under the Utah Enabling Act of July 16, 1894, 28 Stat. 107, but to which plaintiff was denied title because of the creation of federal reserves, the initiation of private rights in such lands either prior to survey or prior to statehood, or for other reasons;

(b) Plaintiff's selection lists are still pending before the Department of the Interior.

(c) The Department of the Interior has initiated a prototype oil shale leasing program under which

the Department selected two tracts of land (identified as Tract U-a and Tract U-b) of 5,120 acres each within the State of Utah for competitive lease bidding. These tracts of land were included in plaintiff's school indemnity selections; and

(d) Pursuant to plaintiff's motion, the Court, on April 5, 1974, issued an order requiring defendant to deposit all bonus payments and rental proceeds received from the successful bidders on Tracts U-a and U-b with the clerk of the court, to be invested in interest-bearing securities pending disposition of this case on the merits. Such payments, to date, have been so invested.

6. *Issues of fact and law.*

(a) *Contested issues of fact.*

None.

(b) *Contested issues of law.*

(1) Whether, by the mere filing of its indemnity selection lists in accordance with applicable statutory requirements and criteria, plaintiff has done all that is required by law to earn equitable title to the selected lands so that all that remains to be done is the ministerial act of issuance of patents;

(2) Whether classification of the selected lands by the Secretary of the Interior, pursuant to the Taylor Grazing Act, as suitable for disposition in satisfaction of plaintiff's school indemnity selection rights is a prerequisite to the vesting of any right to, or interest in, such lands in plaintiff;

(3) If classification under the Taylor Grazing Act is such a prerequisite, then (i) whether the comparative values of the selected lands and the lost school lands ("base" lands) may be considered a factor in determining whether land should be classified for disposition in satisfaction of plaintiff's indemnity rights; and (ii) whether such classification is a "major federal action" within the meaning of the National Environmental Policy Act.

(4) Whether, in any event, plaintiff must exhaust its administrative remedies before seeking affirmative judicial relief.

7. *Witnesses.*

The parties contemplate calling no witnesses.

8. *Exhibits.*

The parties contemplate the submission of no exhibits. However, in the event of any controversy with respect to the current status of plaintiff's indemnity selection lists, defendant will furnish the Court, by affidavit or otherwise, such information as may be needed to show that status.

9. *Discovery.*

The parties contemplate no discovery.

10. *Trial and estimated time.*

The parties believe the controversy should be disposed of upon motion for judgment on the pleadings or motion for summary judgment without a trial. If oral argument is granted by the court, it is anticipated that each party will desire approximately 45 minutes.

DATED this 10th day of June, 1975.

/s/ Ramon M. Child  
RAMON M. CHILD  
United States Attorney  
200 U.S. Court House Bldg.  
350 South Main Street  
Salt Lake City, Utah 84110

Gerald S. Fish, Attorney  
Department of Justice  
Washington, D.C. 20530

Attorneys for Defendant,  
Secretary of the Interior

/s/ Clifford L. Ashton  
CLIFFORD L. ASHTON  
Special Assistant Attorney  
General  
141 East First South  
Salt Lake City, Utah 84111

/s/ Richard L. Dewsnup  
RICHARD L. DEWSNUP  
Spec. Asst. Attorney General  
Suite 9, 445 East 200 South  
Salt Lake City, Utah 84111

/s/ Dallin W. Jensen  
DALLIN W. JENSEN  
Asst. Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114  
Attorneys for Plaintiff,  
State of Utah

ORDER

IT IS HEREBY ORDERED that the foregoing Stipulation of the parties should be and is hereby approved and adopted as the Pre-Trial Order to govern further proceedings in this action.

DATED this 16 day of June, 1975.

/s/ Willis W. Ritter  
WILLIS W. RITTER  
Chief Judge  
United States District Court

## PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Filed Aug. 18, 1975]

Plaintiff State of Utah respectfully moves the Court for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure, in accordance with the prayer of Plaintiff's Complaint. Plaintiff requests the Court to adjudicate and determine that Utah obtained equitable title to the lands in dispute by virtue of filing the indemnity selections in accordance with all legal requirements, that Utah is entitled to all funds on deposit with the Court and interest accumulated thereon, and that the Secretary of the Interior is obligated by law forthwith to issue clear lists covering the subject lands selected by Utah.

This motion is based on the pleadings on file herein, on the Stipulation of the parties dated June 10, 1975, on the Affidavit of Charles R. Hansen (attached to this motion as Exhibit A and by this reference made a part of this motion), and on the ground that there are no material facts in controversy in this proceeding.

The parties have agreed to file memoranda of law in support of their respective motions for summary judgment on or before September 15, 1975, and it is requested that the Court set this matter for oral argument at the earliest date thereafter that is convenient to the Court. It is further requested that, if convenient to the Court, the matter be heard pursuant to a special setting rather than on the regular law and motion calendar.

DATED this 18th day of August, 1975.

Respectfully submitted,

/s/ Clifford L. Ashton  
CLIFFORD L. ASHTON  
Special Assistant Attorney General  
5050 Highland Drive  
Salt Lake City, Utah 84117

/s/ Richard L. Dewsnup  
RICHARD L. DEWSNUP  
Special Assistant Attorney General  
445 East 200 South, Suite 9  
Salt Lake City, Utah 84111

/s/ Dallin W. Jensen  
DALLIN W. JENSEN  
Assistant Attorney General  
442 State Capitol Building  
Salt Lake City, Utah 84114  
Attorneys for Plaintiff  
State of Utah



## EXHIBIT A

## AFFIDAVIT OF CHARLES R. HANSEN

STATE OF UTAH                    )  
   ) SS.  
 COUNTY OF SALT LAKE        )

CHARLES R. HANSEN, first being duly sworn upon oath, deposes and says that he is the Director of the Division of State Lands of the State of Utah, and that:

1. During numerous meetings between 1966 and 1974 between representatives of the Utah Division of State Lands and representatives of the office of the State Director of the Bureau of Land Management, held to discuss the adequacy and status of Utah's oil shale selections as indemnity for lost school lands (which are the subject of the present litigation), Utah was advised that there was no objection or question on the part of the Federal Government with respect to whether such selections were in compliance with all statutory and regulatory requirements pertaining thereto, with the exception of the advisability of the State of Utah making selections which would constitute "manageable blocks" of land, and in this regard Utah did thereafter file such selections in such a manner as to satisfy all suggestions offered by the Bureau of Land Management. The final suggestions by the Bureau in this regard were explained in a meeting held December 19, 1968, attended by myself and members of my staff as representatives of the State of Utah and by Mr. Robert D. Nielsen, as the State Director of the Bureau of Land Management, and members of his staff as representatives of the Bureau of Land Management. The suggestions offered by the Bureau were formally approved by the Utah Board of State Lands on January 15, 1969, and in compliance therewith Utah subsequently prepared and filed the selection lists dated December 19, 1969 (25,583.20 acres), February 17, 1970 (38,058.81 acres), November 8, 1971 (11,044.87 acres), November 15, 1971 (11,977.49 acres), and November 19, 1971 (12,216.59 acres), and this brought the total

pending state selections on oil shale lands to 157,255.90 acres.

2. On numerous occasions I have discussed the status of these pending applications with appropriate representatives of the Federal Government, including discussions with Harrison Loesch, former Assistant Secretary of Interior, and with Reid Stone, Federal Oil Shale Coordinator, and on each occasion I was advised that federal action on the State selections was awaiting development of the Federal proto-type program for oil shale leasing, and that as soon as that program was developed to the point that the Federal Government was ready to issue the original leases, they believed that the selection lists as filed by Utah would be approved and clear lists issued. It was not until February 14, 1974, that Secretary Rogers Morton formally advised Governor Calvin Rampton that the Department of Interior intended to apply a comparative value test to determine whether the oil shale lands selected had substantially more value than the base lands for which selection was made.

3. Documents from the files of my office and from the files of the Bureau of Land Management, which appear to have some relevance to the matters mentioned above and to this litigation, are identified below and are appended to this affidavit in chronological sequence, and to the best of my knowledge they are true and correct copies, and by this reference said documents are included within and made a part of this Affidavit;

*Appendix A:* Document dated February 9, 1961, consisting of three pages plus three fold-out tabulations, which is an illustrative example of a clear list which the Bureau of Land Management did issue to the State of Utah in response to selection application for lands believed to contain oil shale deposits.

*Appendix B:* Document dated September 14, 1962, consisting of two pages, which is a memorandum from the Associate Solicitor of the Division of Public Lands to the Director of the Bureau of Land Management.

*Appendix C:* Document dated September 11, 1964, consisting of one page, which is a report to the State

Director from the Vernal District Manager of the Bureau of Land Management, discussing lieu selections.

*Appendix D:* Document dated October 29, 1964, consisting of one page, which is a memorandum to the State Director from the Vernal District Manager, discussing lieu selections.

*Appendix E:* Document dated May 24, 1965, consisting of one page, which is a letter from the Utah Director of State Lands to the State Director of the Bureau of Land Management, discussing lieu selections.

*Appendix F:* Document dated November 22, 1965, consisting of two pages, which is an illustrative confirmatory patent to confirm title to school lands in place.

*Appendix G:* Document dated December 15, 1966, consisting of three pages, which is a memorandum from the Director of the Bureau of Land Management to the Secretary of the Interior discussing comparative values of base lands and lieu lands, and indicating the approval thereof by the Secretary under date of January 18, 1967.

*Appendix H:* Document dated June 30, 1967, consisting of four pages, which is a memorandum to the State Director from the Vernal District Manager, discussing lieu selections.

*Appendix I:* Document dated November 24, 1967, consisting of one page, which is a memorandum to the State Director from the Vernal District Manager, discussing lieu selections.

*Appendix J:* Document dated May 8, 1968, consisting of two pages, which is a memorandum to the State Director from the Vernal District Manager, discussing lieu selections.

*Appendix K:* Document dated December 19, 1968, consisting of three pages, which is a memorandum prepared by J. E. Keogh of the Bureau of Land Management summarizing a meeting between state and federal officials concerning lieu selections.

*Appendix L:* Document dated May 9, 1969, consisting of four pages, from the State Director to the Director of the Bureau of Land Management, discussing, inter alia, lieu selections.

*Appendix M:* Document dated July 1, 1971, consisting of two pages, which is a letter to the Chairman of the Council on Environmental Quality from the Deputy Solicitor of the Department of Interior, discussing the applicability of the National Environmental Policy Act to various land grants.

*Appendix N:* Document dated May 23, 1972, consisting of one page, which is a letter from the Secretary of Interior to the Governor of Utah, concerning lieu selections.

*Appendix O:* Document dated January 24, 1974, consisting of one page, which is a letter from the Governor of Utah to the Secretary of Interior, concerning lieu selections.

*Appendix P:* Document dated February 14, 1974, consisting of one page, which is a letter from the Secretary of Interior to the Governor of Utah, discussing lieu selections.

*Appendix Q:* Document dated February 15, 1974, consisting of one page, which is a letter from the Solicitor of the Interior to the Utah Attorney General.

*Appendix R:* Document dated February 22, 1974, consisting of two pages, which is an agreement between the State of Utah and the Department of Interior concerning the proto-type oil shale leasing program.

*Appendix S:* Document dated February 25, 1974, consisting of two pages, which is a memorandum from the Library of Congress to Senator Frank E. Moss, concerning the applicability of the National Environmental Policy Act to certain land grants.

*Appendix T:* Document dated March 21, 1974, consisting of five pages, which is a memorandum to State Directors from the Director of the Bureau of Land Management concerning state indemnity selections, and which includes as appendices the February 14, 1974 letter from Secretary Morton to Governor Rampton and the "Udall Memorandum" prepared December 15, 1966, and approved January 18, 1967.

*Appendix U:* Document dated May 13, 1974, consisting of one page, which is a memorandum from the Associate Director of the Bureau of Land Management



to the State Directors, concerning state indemnity selections.

*Appendix V*: Undated document, consisting of two pages, which is a letter from the Solicitor of Interior to Senator Frank E. Moss, concerning the applicability of the National Environmental Policy Act to lieu selections. I believe this letter was transmitted in February or March of 1974.

Dated this 18th day of August, 1975.

/s/ Charles R. Hansen  
CHARLES R. HANSEN

SUBSCRIBED AND SWORN to before me this 18th day of August, 1975.

/s/ Lynda Belnac  
Notary Public, Residing in  
Salt Lake City, Utah

My Commission Expires: 10-1-77

# APPENDIX B

Sept. 14, 1962

## MEMORANDUM

TO: Director, Bureau of Land Management

FROM: Associate Solicitor, Division of Public Lands

SUBJECT: State Indemnity Selections

In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered. As was stated in *Stephen Blaine Keilstone* (A-25889, August 24, 1950) :

"The application is one to indemnify the State for losses in school lands which were granted to the State . . . but title to which never passed to the State because the lands had been sold or otherwise disposed of before the State was admitted to the Union or because of other reasons . . . . Consequently, the base land assigned by the State in its application is not land now owned by the State which will pass into Federal ownership upon approval of the State's application. There is no requirement in the statutes authorizing indemnity selections, or in the Department's regulations on such selections, that the base lands shall be equivalent in value to the selected lands. . . ."

This position in the ordinary type of state selection was affirmed again in 1956. M. 36331.

When the state lieu selection statutes were last amended in 1958, it was clear that Congress recognized the practice by the states of offering as base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law. As this Department stated in its letter to the Chairman, House Committee on Interior and Insular Affairs, which was adopted by the Com-



mittee in its report accompanying S. 2317 (the 1958 amendment), H.R. 2347 85th Cong., 2d Sess., p. 4.

In giving a State selections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of *equal acreage rather than equal value* carries this policy forward. (Emphasis added.)

Accordingly, it is clear that the 1958 amendments to the state indemnity selection laws not only reaffirmed the position of this Department that discrepancies in values between offered and selected lands was not to be considered, but also intended the equal acreage rather than equal value test be carried forward in the case of mineral lands. Therefore, the mere fact that the mineral value of the selected lands far exceeds that of the offered lands may not operate as a bar to the selection.

THOMAS J. CAVANAUGH  
Associate Solicitor  
for Public Lands

## APPENDIX G

IN REPLY REFER TO:  
722 (2222)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
Washington, D.C. 20240

Memorandum

Dec 15, 1966

To: Secretary of the Interior  
Through: Assistant Secretary,  
Public Land Management

From: Director, Bureau of Land Management

Subject: State Indemnity Selections—Cane Creek  
Potash Deposits

The selection of the Cane Creek Potash deposits by the State of Utah in satisfaction of its school land grant raised certain questions including:

1. The policy of Congress with respect to the selection of deposits of "hard-rock" leasable minerals, and
2. The policy of Congress with respect to equality of value between the selected and the lost lands.

The Attorney General in his opinion of February 7, 1963, pointed out that the question of availability of particular lands for State indemnity selections was a matter within the discretionary authority of the Secretary granted by section 7 of the Taylor Grazing Act.

To give the Congress the opportunity to express itself clearly on these questions, the Secretary sent forward an executive communication which was introduced as H.R. 16, 89th Congress. If enacted, H.R. 16 would have established the rule that selections of lands valuable for leasable minerals could be approved only if the lost lands used as base for the selections were equal in value. The

House Committee on Interior and Insular Affairs tabled the bill. Thus the Congress did not express itself on the matter.

In its testimony before the House Committee, the Department urged enactment of H.R. 16. The House passed instead H.R. 5984. This bill consisted of two of the features of H.R. 16, both of which were additional benefits to the States. In its testimony before the Senate Committee, the Department restated its preference for the equal-value legislation and indicated its lack of objection to the features of S. 1883 and its companion H.R. 5984. It stated further that, if Congress did not express itself on the larger questions, the Department would exercise its existing authority to "*Control the selection of high value* mineral lands through the classification process, to the extent it is able to do so."

After H.R. 5984 was enrolled, it was signed into law only after the Department assured the Executive Office that through classification and withdrawal procedures it would prevent State indemnity applications "... that involve grossly disparate values. ..."

Normal channels of administrative review will be available to settle questions of disparity of values which may arise in connection with applications for selection presented to the Bureau of Land Management. This process will be facilitated, however, if the Bureau has guidelines for its use in considering individual applications. We recommend the following guidelines for our use:

1. An estimate will be made of the present value of the "selected land" in its present condition and of the present value of the "base land" in its "native condition." The term "native condition" means that if the resources of the "base land" have been diminished by mining, harvesting, etc., the estimate will assume that the original resources are intact. It also means that if the value of the "base land" has been increased by improvements or by Government developments, the estimate will not include the value so added. If the "base" results from fractional selections or townships, the estimate will be based on

the average value of lands in the general vicinity of the loss. The value of the "base land" will not be estimated if the estimated value of the "selected lands" is \$100 per acre or less.

2. If the estimated value of the "selected lands" is more than \$100 per acre, then the values will not be considered grossly disparate if the value of the "selected lands" exceeds the value of the "base lands" by less than \$100 per acre or by 25% of the value of the "base land", whichever is greater. [If such estimate exceeds these limits, the case will be submitted to Washington for evaluation of all the circumstances.<sup>1</sup>]

3. The above estimates will be made for all applications for selection to the extent the applied-for lands are subject to classification. Whether or not values are grossly disparate under the above rules, any denial of the petition for classification will include all reasons for denial of the petition.

Your approval of this memorandum will constitute your approval of the suggested guidelines.

/s/ Boyd L. Rasmussen  
BOYD L. RASMUSSEN

Approved: Jan. 18, 1967

/s/ Stewart L. Udall  
Secretary of the Interior

<sup>1</sup> The bracketed sentence does not appear in the copy of this memorandum which was made part of the record in this case. However, it does appear in the memorandum officially retained in Interior Department files.

## APPENDIX K

General File Copy No. 2222

REPORT OF MEETING WITH  
UTAH DIVISION OF STATE LANDS

## Attendance:

R. D. Nielson

Charles R. Hansen (Utah)

Mark Crystal, Div. State Lands

Gail Prince, Div. of State Lands

Jim Keogh, Staff, USO

Date—12/19/68

Place—Utah State Director's Office

Time—10:30 a.m.

State Director Nielson opened meeting stating that BLM would like to satisfy the State of Utah's outstanding indemnity selection entitlement (234,466 acres) as early as possible. He referred to our suggestion presented to the Land Board earlier this calendar year.

Hansen said the State Land Board prefers that BLM proceed with action on the State's pending applications (142,247 acres) on a one at a time basis as the program has proceeded in the past. He said the board did not favor a plan for satisfying total entitlement at this time.

Nielson outlined status of pending selection applications as follows:

1. *Oil Shale Selections*—That the Washington office authorized him to negotiate with the State to develop for consideration of the Secretary a mutually agreeable proposal between the State and BLM in the Uintah Basin area with a view of satisfying the State's entire entitlement in that area. (Further reference to proposal is made later in this report)

2. *Alton coal selections*—mineral report prepared and will be submitted to Washington shortly recommending

that selection applications be approved except for lands classified by USGS as being within producing or producible mineral leases. Decision on those lands classified as being within producing leases, will be issued this week.

3. *Kaiparowits coal selections*—mineral report still in process, but said we would not likely recommend transfer of the lands involved.

4. *Carbon County coal selections*—USGS report showed most of lands applied for were within producing or producible mineral leases. Decision as to such lands will be issued this week.

5. *North slope-Phil Pico phosphate selections*—10,484 acres transferred to State by Clear List No. IL 307 dated December 6, 1968.

6. *Seven Mile potash selections*—mineral report in process. It was noted that lands along the eastern edge of the selection area may be included in a proposed extension to Arches National Monument.

7. *Jensen selection area*—BLM is waiting for response from State on BLM suggested adjustment dated June 20, 1967 in area to be selected so as to conform selection to management unit.

8. *Salt Lake Valley selection*—Salt Lake County protested selection of this 2.2 acre tract on Jordan River. County asked for 30 day period to see if they could work matter out with State. Hansen said his Division was processing application on behalf of University of Utah and has referred county representative to university officials.

From a map of the Uintah Basin oil shale area prepared by BLM showing various management units, considerable discussion of a number of proposals referred to in item 1 (above) of this report took place. As a result, the Director of State Division of Lands agreed to discuss with the Land Board the possibility of the State selecting an area of approximately 120,000 acres<sup>1</sup> (areas in A2, A3, B3, and D on map of Uintah Basin area prepared 10/29/68) in two blocks: Block 1:

<sup>1</sup> Note: this is in addition to the 48,500 acres in pending selection applications.



Bounded on north by White River, on west by Two Water Creek, or Bitter Creek on east by Colorado-Utah boundary and on south by south boundary of T. 12 S., R.'s 23-25 E. (A2, B3, and D) and Block Two: an area adjoining State owned lands in the Book Cliff Mountains in Tps. 15-19 S., R.'s 20-24 E. (Area A3).

State Director Nielson pointed out that this proposal for blocking state selections in the Bitter Creek-White River area is being considered as a compromise approach to satisfying state selections. If this proposal is approved it will allow transfer of some of the highest grade oil shale lands in the state and the state would no longer pursue further selections in the oil shale area.

Nielson further expressed that BLM will also consider this as a compromising proposal in lieu of allowing selections in the Kaiparowits coal reserve in the middle of the Kaiparowits Plateau where BLM lands are predominate.

Nielson pointed out that by allowing this preferred selection the state should then recognize some obligation in satisfying its remaining outstanding selection rights in other areas that would tend to block state lands without serious interference of important public land management programs, such as was suggested in the bureau's proposal to the State Land Board earlier this calendar year.

Nielson made it clear that the proposal for allowing the oil shale land selection was not a commitment on the part of BLM or the Secretary, and that he would like a response from the State Land Board before discussing such a proposal with his Washington Office. Hansen said that while the Board just met and would not be meeting for some time, he would try to discuss the proposal with them by telephone and let Nielson know of their reaction within a couple of weeks.

Hansen asked about status of State exchange in southeast San Juan County and if highway right of way application through selection area had been filed. It was reported that the field work has been done, appraisal report was in preparation, and that the right of way application had been filed. Nielson said we would meet

with State Division of Lands when our reports are completed.

Nielson reported that completion of our appraisal report was expected this week in connection with State exchange application involving acquisition by BLM of State lands in the Sand Dunes recreational area and the State's acquisition of Federal lands to assist Brush Beryilium expansion.

Nielson closed the meeting by saying that BLM would like to move aggressively in an exchange program of blocking up State and Federal holdings in management units.

Meeting adjourned at 11:30 a.m. No new date set for another meeting.

/s/ J. E. Keogh

cc Wash. attn code 720.

## APPENDIX L

Central Files Copy Nos. 2620 2222

## STATE OFFICE

Post Office Box No. 11505  
Salt Lake City, Utah 84111

May 9, 1969

## Memorandum

To: Director

From: State Director, Utah

Subject: State Indemnity Selections—Utah

Among the important matters I expect to discuss with your staff in my forthcoming visit to Washington is a tentative proposal worked out by mutual agreement with the Utah State Division of Lands for satisfying in total the State's outstanding indemnity selection entitlement of 233,186 acres under the Act of February 28, 1891, as amended.

The essential elements of the tentative proposal are as follows and the areas referred to are shown on Exhibits 1 and 2 transmitted under separate cover in map tube #1, Attn. Code 302.

1. Transfer in a management unit (see Tract 1, Exhibit 2) to the State approximately 149,792 acres of valuable oil shale lands in the Uintah Basin of eastern Utah—48,042 acres within the management unit are already included in pending selection applications.
2. Block-up extensive State land holdings in the Book-cliff Mountains (see Tract 2, Exhibit 2) in the Uintah Basin in eastern Utah by transfer of approximately 35,244 acres of bituminous sand and low-grade oil shale lands.
3. Deny pending selection applications covering 20,450 acres of valuable coal lands in the Kaiparowits Plateau (see Exhibit 1) in southern Utah, and also deny pend-

ing applications covering 9,720 acres of valuable oil shale lands lying outside the management unit referred to in item 1 above.

4. Approve, subject to minor adjustments for conformance to management units, pending indemnity selection applications covering approximately 37,000 acres distributed in 12 different sites over the State (see Exhibit 1). Of these pending selections, only one has significant mineral values; this is the Seven Mile potash selection (19,417 acres) lying a few miles north of the Cane Creek potash area near Moab, Utah.

5. The State of Utah would recognize its obligation to complete promptly its indemnity selection program by satisfying its remaining entitlement (estimated to be about 12,500 acres) in blocks that would tend to consolidate State lands within areas suggested to the Division of State Lands back on January 24, 1968. (See overlay with Exhibit 1.)

6. There are 38,100 acres of KGS lands within the proposed oil shale selection areas, and transfers of such public lands will be subject to the reservation to the United States of oil and gas deposits.

In a meeting of December 19, 1968 with Charles R. Hansen, Director of the Utah State Division of Lands, in which the tentative proposal was worked out, I made it clear to Mr. Hansen that the proposal was a tentative one and was in no way a commitment on the part of BLM or the Secretary. In fact, Mr. Hansen had first to get a response from the State Land Board before he could give us the OK to discuss it in Washington. His verbal OK has been received.

These outstanding selection rights have been a most perplexing problem to us despite the considerable accomplishments we have achieved in reducing their outstanding entitlement by 329,213 acres since 1960 compared to its reduction by only 26,878 acres in the preceding decade.



It is the announced policy of the State of Utah to select their entitlement from public lands having the highest value for revenue producing purposes, particularly high value mineral lands. Hr. Hansen stated frankly in one (May 29, 1968) of our periodic meetings to discuss programs having mutual interest to our respective agencies, that the State doesn't have the funds or staff to undertake management responsibilities on State lands.

The State has followed the policy of distributing their selections on a piecemeal basis among a large number of sites (see Exhibit 1) with little or no regard to filing selections in management units, and often filing them only to accommodate a private interest. In fact, prior to this time, the State did not favor a plan for satisfying their total entitlement.

The State is absolutely opposed to what they regard as continued efforts—even after legislation introduced in 1965 (H.R. 16) failed to get Congressional approval—of BLM and the Department to impose the concept of equal value in base and selected lands. Consistent with their announced policy the State selects public lands many times more valuable than that of the base lands. Since most of their selections are for high value mineral lands, a major factor contributing to the continuance of this situation is the lack of a mineral classification category with respect to solid leasable minerals (i.e., oil shale, coal, potash, phosphate, etc.) comparable to the KGS (known geologic structure) classification category applicable to oil and gas fields.

It is important that the State's outstanding indemnity selection entitlement be satisfied as soon as possible. Important Bureau resource development programs requiring land tenure adjustments involving extensive acreages of State school lands scattered among vast areas where public ownership predominates are being hampered because the State is not interested in developing a viable exchange program with BLM until the indemnity selection program is resolved.

The piecemeal manner in which we have had to attack the problem with its constant rejections and adjustments

of applications has added immeasurably to our workload, and has not tended to improve our relations with the State and with the Utah Congressional interests who are either not sympathetic to our position, or who do not understand it.

The key to the tentative proposal is centered around the selection of approximately 125,000 acres of valuable oil shale lands in Tract 1 on Exhibit 2, and discussed in the attached report of mineral values dated May 9. As stated in that report, Tract 1 encompasses about one-half of the total oil shale deposits in Utah thought to have possibilities for commercial development, and about one-fourth of the richest deposits in Utah. It represents the important consideration of whether or not valuable oil shale lands should be transferred out of Federal ownership.

Since the indicated value estimates of the oil shale lands range from \$175 to \$900 per acre, value considerations of the base and selected lands are involved, inasmuch as the average value of the lands available for use by the State of Utah as base for the selection is likely to range from \$5 to \$25 per acre.

The oil shale area designated in the tentative selection proposal was carefully delineated to provide a suitable block of land for management of the mineral as well as surface resources. Natural features, accessibility and land ownership of them were utilized to the extent possible in determining the boundaries of the tract. No critical management problems are foreseen if the selection of the tract occurs.

Presently, livestock grazing is the main use being made of surface resources. About 16,833 AUM's of livestock forage are used annually from the area. This is mostly winter grazing by sheep. The area is used by the north Book Cliffs deer herd as a winter range. However, the area is not considered to be a critical or key deer winter range. Also, a few deer hang along the White River bottoms year-long.



Recreation use is not great. The recreation use that does occur is mostly in the form of deer, rabbit and chukar hunting. Also, there is some driving for pleasure, rockhounding, etc. We estimate 5,000 annual visitor-days use on the area.

The land is generally quite erodable, but no watershed improvement projects have been programmed for the near future. There are some forest products harvested from the area. About half the land is forested with pinon-juniper. These trees are small and poorly formed at the lower elevations but well formed at higher elevations near the south edge of the selected area. Firewood is the most important forest product. There are also some posts and Christmas trees cut from the area.

BLM investments within the area are estimated as follows:

	<u>Improvement Cost</u>
Corral (one)	\$ 750
Stock reservoirs (17 @ \$200 ea.	3,400
Fence (46.5 mi. @ \$1,000/mi.)	46,500
Water wells converted from gas wells (2 @ no cost to BLM)	
Water well (1 @ \$2,000)	2,000
Total	<u>\$52,650</u>

In short we think the tentative proposal has merit, and I am looking forward to discussing it with your staff.

/s/ R.D.N.

Attachments:

1. Report
2. Maps w/ overlays (sent under separate cover)

JEKeogh:vh

APPENDIX M  
UNITED STATES  
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

Jul. 1, 1971

Honorable Russell E. Train  
Chairman  
Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, D.C. 20006

Dear Mr. Chiarrman:

On September 1, 1970, we submitted a report under section 103 of the National Environmental Policy Act. This letter is intended to supplement that report insofar as it pertains to the agency jurisdiction of the Bureau of Land Management (BLM).

Since 1934 private entry on lands within the continental United States may be made only after classification under the Taylor Grazing Act (43 U.S.C. § 315 *et seq.*) Were it determined in advance that use of the land would be inconsistent with environmental considerations, the BLM would adversely classify the land and reject the application. However, once entry is allowed, environmental considerations cannot constitute a basis for cancellation of the entry or refusal to issue a patent. Once a patent is issued under the homestead laws (43 U.S.C. § 161 *et seq.*), or the Small Tract Act (43 U.S.C. § 682a), all jurisdiction of this Department terminates. This Department has recommended repeal of most of the archaic land laws; we advocate a general sales act with built-in environmental safeguards.

The BLM has no environmental control over mandatory land disposals. In this category fall grants to the several States for school purposes, university grants and grants in other general purposes made by the various Statehood Acts. Particularly noteworthy is the immense grant made to the State of Alaska by section 6 of the Statehood Act of July 7, 1958, 72 Stat. 339. Other disposals of this type are the *in praesenti* grant of the Swamplands

Act (43 U.S.C. § 980 *et seq.*), the mandatory state exchange provision of section 7 [*sic*: 8?] of the Taylor Grazing Act (43 U.S.C. § 315g), as well as the many special grants made to various cities, States and individuals by numerous special and private statutes. In the majority of cases involving special grants BLM is merely a record keeping agency for the convenience and may not impose any terms, stipulations, or conditions. Another mandatory type of disposal is that which arises under the provisions of R.S. 2477 (43 U.S.C. § 932). Under this grant, any State or local political subdivision may locate roads on unwithdrawn public lands without BLM consent. Legislation would be necessary in order to consider environmental factors in connection with grants of this type.

The so-called location and settlement laws leave BLM without authority to consider environmental factors in their administration. In Alaska particularly, the homestead settlement laws (48 U.S.C. § 371 *et seq.*), the native allotment law (48 U.S.C. § 357), and the purchases authorized for headquarters, trade and manufacturing or homesites (48 U.S.C. § 461) permit entry without prior approval of the BLM. A similar situation arises throughout the United States under the mining laws (30 U.S.C. § 21 *et seq.*). The Department has no control over entries made pursuant to these laws and the basic statutes under which the entries are made do not admit of environmental considerations. New legislation is required, and the Department has consistently recommended such legislation.

Although the Department has authority to impose adequate protection of the environment on any leases or permits, granted in the future; e.g., mineral leases under the Mineral Leasing Act of 1920, as amended (30 U.S.C. §§ 181-287), or the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1343), it has limited authority to impose additional environmental requirements on existing leases or permits.

Sincerely yours,

/s/ Raymond C. Coulter  
RAYMOND C. COULTER  
Deputy Solicitor

## APPENDIX N

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
Washington, D.C. 20240

May 23, 1972

Dear Governor Rampton:

Pursuant to the agreement reached between your representative, Mr. Charles Hansen, Director of the Division of State Lands of the State of Utah, and the representatives of this Department, I am herewith providing you with the following information and assurances.

The opinion of the Attorney General has been requested concerning the filings for selection of mineral lands by the State of Utah. The Attorney General has been asked whether there is any legal barrier to the approval of the filed selections of the State of Utah and at what point in time the rights of the State vest, i.e., at the time of filing for selection or at the time of approval of such selections.

This Department agrees not to undertake any classification of the lands in question until after the opinion of the Attorney General has been received. Therefore, the Geological Survey will not classify any mineral deposits in the lands as "producing or producible," nor will I classify the lands as to their suitability for State selection.

In view of the fact that the terms of the selection statute, 43 U.S.C. § 852 (1970), expressly dictates the division of any proceeds from any outstanding mineral leases on the lands at the time of State selection, there is no need for any agreement between the State of Utah and the United States on this subject. In dividing the proceeds of outstanding mineral leases, this Department will follow the opinion of the Attorney General as to that point in time when the rights of the State vest in the selected lands. If the Attorney General finds that there is no

legal barrier to the approval of the State selection, then this Department will initiate the administrative steps necessary to accomplish that approval.

With this information and assurances at your disposal, will you withdraw any objection to the proposed leasing of two tracts of land in Utah for oil shale development?

Sincerely yours,

/s/ Rog  
Secretary of the Interior

Honorable Calvin L. Rampton  
Governor of Utah  
Utah State Capitol  
Salt Lake City, Utah 84114

cc: Mr. Charles Hansen, Director  
Division of State Lands  
State of Utah



## APPENDIX O

January 24, 1974

The Honorable Rogers C. B. Morton  
 Secretary of the Interior  
 Department of the Interior  
 Washington, D.C. 20240

Dear Mr. Secretary:

As you are aware, I have asked the Attorney General of Utah to commence legal action to compel the Department of the Interior to grant the State of Utah certain public lands which we are seeking under our original state selection rights. There is one matter which I believe should be taken care of by negotiation between the State of Utah and your Department at the time or immediately after the action is filed.

You have announced that on March 5, 1974 and April 2, 1974 two tracts of oil shale bearing land in the State of Utah will be offered for bid on a lease basis to interested oil companies for the purpose of an oil shale extraction operation. These two tracts are within the area sought by the State of Utah under the selection rights which are a subject of the proposed law suit. I do not wish to interfere with the letting of these leases under the proposed bidding procedure.

Shortly before the announcement was made that these tracts would be let for bid your office asked me to furnish you with a statement to the effect that the pendency of our selection application would not be construed as a cloud on the title of these tracts and that the State of Utah would recognize the right of the lessee under any lease granted on these tracts by the U.S. Government. I did furnish you with such a letter. I would like to have that understanding continued as a stipulation in the law suit. Therefore, as quickly as the suit is filed and you are served, the State of Utah will be prepared to enter into a stipulation consenting to the leasing of these two tracts by the U.S. Government and recognizing the rights of any lessors under such lease.

Sincerely,  
 Governor

CLR:b

## APPENDIX P

UNITED STATES  
 DEPARTMENT OF THE INTERIOR  
 OFFICE OF THE SECRETARY  
 Washington, D.C. 20240

February 14, 1974

Dear Governor Rampton:

This is in response to your letter of January 24, 1974, regarding applications filed by the State of Utah to select certain public lands in Uintah County pursuant to the indemnity selection provisions of Sections 2275 and 2276 of the Revised Statutes, as amended, 43 U.S.C. § 851, *et seq.* (1972).

As you know, the Department of the Interior has not as yet acted upon the State's applications. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above mentioned policy in that adjudication. We have examined the legal arguments set forth by the Attorney General of the State in his letter

to me of January 16, 1974, and have found nothing therein to cause us to alter our legal position.

As you are aware, we contacted the Attorney General of the State of Utah to discuss the possibility of agreement on a stipulation along the lines you have suggested should litigation ensue. We have also brought your letter to the attention of the Department of Justice.

Your suggested stipulation is most constructive and desirable. We shall be happy to enter into such an agreement and thereafter to state in the public notice issued in connection with the leasing that such an agreement has been reached.

Sincerely yours,

/s/ Rog Morton

Secretary of the Interior

Honorable Calvin L. Rampton  
Governor of Utah  
Salt Lake City, Utah 84114

# APPENDIX Q

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

February 15, 1974

Honorable Vernon B. Romney  
Attorney General  
State Capitol Building  
Salt Lake City, Utah 84114

Dear Mr. Romney:

This is in further response to your letter of January 16, 1974.

We have analyzed your legal arguments and, while we respect your views, find that we cannot agree with them. We believe that the "comparative value" criterion is a valid one with respect to classifying lands for State lieu selection; such classification being authorized by Section 7 of the Taylor Grazing Act, 48 Stat. 1272, 43 U.S.C. § 315f (1972). Accordingly, we intend to apply that criterion when we adjudicate the pending State applications.

For your information, I am enclosing a copy of a letter which the Secretary has sent to Governor Rampton.

Sincerely yours,

/s/ Kent Frizzell  
Solicitor

Enclosure

## APPENDIX R

AGREEMENT FOR THE LEASING OF OIL SHALE  
WITHIN TRACT U-a AND TRACT U-b  
IN THE SOUTH OF UTAH

THIS AGREEMENT, made and entered into as of the 22nd day of February, 1974, by and between the UNITED STATES OF AMERICA, through the Secretary of the Interior and the STATE OF UTAH, through the Governor and the Division of State Lands of the State of Utah.

WHEREAS, the United States Department of the Interior, Bureau of Land Management, has announced that Utah TRACT U-a and TRACT U-b will be offered on March 12, 1974 and April 9, 1974, respectively, for oil shale lease by sealed bids to the qualified bidder submitting the highest amount per acre as bonus for the privilege of leasing the lands in accordance with the provisions of the Mineral Leasing Act of February 25, 1920; and,

WHEREAS, the lands included in TRACT U-a aggregate 5,120.00 acres and are described as:

- T. 10 S., R. 24 E., SLB&M,  
Sec. 19, E  $\frac{1}{2}$ ;  
Secs. 20, 21, 22, 27, 28 and 29, all;  
Sec. 30, E  $\frac{1}{2}$ ;  
Sec. 33, N  $\frac{1}{2}$ ;  
Sec. 34, N  $\frac{1}{2}$ ; and,

WHEREAS, the lands included in TRACT U-b aggregate 5,120.00 acres and are described as:

- T. 10 S., R. 24 E., SLB&M,  
Sec. 12, S  $\frac{1}{2}$ , S  $\frac{1}{2}$  N  $\frac{1}{2}$ ;  
Secs. 13, 14, 23 and 24, all;  
Sec. 25, W  $\frac{1}{2}$  W  $\frac{1}{2}$ ;  
Sec. 26, all.
- T. 10 S., R. 25 E., SLB&M,  
Secs. 18 and 19, all; and,

WHEREAS, the State of Utah has filed applications under R.S. 2275 and 2276 as amended (43 U.S.C. 851-852) with the Secretary of the Interior for transfer to the State of Utah of the lands contained in TRACTS U-a and U-b; and,

WHEREAS, the United States and the State of Utah desire that the lease sales by the Department of the Interior on March 12, 1974 and April 9, 1974, under the terms and conditions previously announced by that Department should proceed;

NOW, THEREFORE: It is agreed by and between the United States of America and the State of Utah:

- 1) That the Department of the Interior may proceed with the lease offers scheduled for March 12, 1974 and April 9, 1974, under the terms and conditions contained in the notice of that offer published in the Federal Register of November 30, 1973, (38 F.R. 33187); and,
- 2) That if, as the result of the bonus bids received pursuant to those offers, the Secretary of the Interior should determine that oil shale leases should be issued then the Secretary in his sole discretion may issue the leases; and,
- 3) That if, as the result of action by the Secretary, or by a court order or decree, or otherwise, the State of Utah is or becomes vested with any right or interest in the lands or minerals contained within those TRACTS, the State of Utah will be bound by and fully honor all of the terms and conditions of any lease or leases issued as a result of the March 12, 1974 and April 9, 1974 lease offerings, as fully as the United States of America as lessor will be bound by said leases.
- 4) That the State of Utah claims that it is entitled not only to the lands herein identified, but that it is also entitled to all lease rentals and bonus funds which the Secretary may receive from the successful bidders, if any. The United States denies the validity of such claims. The State of Utah intends to file a lawsuit within the near future to obtain judicial enforcement of the rights which it claims to have. The execution of this agreement in no way recognizes, validates, waives, releases or



in any way affects the legal rights, claims or respective positions of the parties hereto.

IN WITNESS WHEREOF, the United States of America, acting by and through the Secretary of the Interior, and the State of Utah, acting by and through the Governor and the Division of State Lands of the State of Utah, have executed the foregoing instrument.

THE UNITED STATES OF AMERICA

/s/ Rogers C. B. Morton  
Secretary of the Interior

THE STATE OF UTAH

/s/ Calvin L. Rampton  
Governor of the State of Utah

/s/ Charles R. Hansen  
CHARLES R. HANSEN, Director  
Division of State Lands

APPENDIX T

IN REPLY REFER TO:

2620 (322)

UNITED STATES  
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Washington, D.C. 20240

March 21, 1974

Instruction Memorandum No. 74-106

Expires 12/31/74

To: SD's, SCD

From: Director

Subject: State Indemnity Selections

Enclosed is a copy of the letter of February 14 from the Secretary of the Interior to Governor Calvin L. Rampton of Utah.

This letter to Governor Rampton is a restatement of the policy adopted by the Department in 1967 that, "... in the exercise of his discretion, under, *inter alia*, Section 7 of the Taylor Grazing Act, he [the Secretary] would refuse to approve indemnity applications that involve grossly disparate values." See the enclosed copy of the memorandum approved on January 18, 1967, by the Secretary.

The February 14 letter by Secretary Morton announces the Department's policy in clear and succinct language. Accordingly, in your adjudication of any pending or future indemnity applications, be sure to give full consideration to the values of the "lost" lands and those selected as indemnity therefor, to the end that we do not approve or recommend for approval any selection in which there is gross disparity of values by the selection of "high-value" lands for "low-value" base lands lost to the State.

This policy will be incorporated in the Manual at the first opportunity.

/s/ Ernest Berklund

2 Enclosures

Encl. 1—Copy of ltr dtd 2/14/74 to Gov. Rampton

Encl. 2—Copy of memo approved Jan. 18, 1967

APPENDIX U

IN REPLY REFER TO:

2620 (322)

UNITED STATES  
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Washington, D.C. 20240

May 13, 1974

Instruction Memorandum No. 74-106, Change 1

Expires: 12/31/74

To: SD's, SCD

From: Associate Director

Subject: State Indemnity Selections

On March 27, 1974, we were notified that the State of Utah had filed a complaint against the Secretary of the Interior, entitled *The State of Utah v. Rogers C. B. Morton individually and as Secretary of the Department of the Interior*, USDC-Utah, C-74-64. This complaint is based upon State indemnity selection applications filed by the State of Utah to select approximately 157,200 acres. The State alleges that this Department has unduly delayed in approving these selections.

Instruction Memorandum No. 74-106 of March 21, enclosed the Secretary's letter to Governor Rampton of Utah which clarified the Department's policy that it would refuse to approve indemnity applications that involve grossly disparate values between the selected lands and the "lost" lands, where the value of the applied-for lands greatly exceeds the value of the lost school lands for which the State seeks indemnity.

If you have cases now pending where the situation described prevails, as in the State of Utah cases, as a matter of Departmental policy you are to suspend them immediately pending final determination by the courts in the Utah suit. No action should be taken which would

in any way commit this Department until the final court decision has been issued. Thereafter, appropriate instructions will be issued in accord with the terms of the court decisions.

The question has also been asked as to how to treat applications by the State wherein the value of the State base land greatly exceeds the value of the applied-for land:

1. If the State is willing to proceed under this type of situation, the application may be processed and the State may amend its filing in order to select lands of more comparable value.
2. We cannot apply high-value "trade-offs" from State base land in one application to low-value base land in another application.

/s/ George L. Turcott

# APPENDIX V

## UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

Honorable Frank E. Moss  
United States Senate  
Washington, D.C. 20510

Dear Senator Moss:

This is in reply to your letter of January 29, 1974, to Secretary Morton regarding the applicability of the National Environmental Policy Act to lieu selections of the State of Utah.

You referred to the letter of July 1, 1971, which the then Deputy Solicitor sent to the Chairman of the Council on Environmental Quality. In that letter it was stated that the Bureau of Land Management is unable to impose environmental controls in connection with disposals of public lands which are mandatory by statute. Among the examples of such mandatory disposal statutes cited by the Deputy Solicitor were the grants to the several States for school purposes. Although the Deputy Solicitor did not cite any particular statutes, his reference was to the *in praesenti* land grants for school purposes made by the Congress in the several Statehood and Enabling acts. In other words, he was referring to the original grants of numbered school sections in place (i.e., sections 2, 16, 32 and 36). There is no question regarding the mandatory nature of such grants.

On the other hand, the Deputy Solicitor made no reference to indemnity (or lieu) selections for lost school lands, and did not intend to refer to such selections, since they are discretionary rather than mandatory. The States have no rights to any public lands merely because they have been applied for as indemnity lands and the Secretary has ample authority to reject such lieu selec-



Accordingly, the action of this Department in preparing an environmental impact statement with respect to the pending applications of the State of Utah is neither arbitrary nor capricious, but on the contrary constitutes compliance with the legislative mandate of the Congress.

The Department shares your desire that the State of Utah's pending lieu selection applications can be resolved in the near future, and we are making every effort to do so.

Sincerely yours,

**/s/ Kent Frizzell**  
**Solicitor**

[Filed Sept. 15, 1975]

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

DONALD G. PRINCE, first being duly sworn upon oath, deposes and says that he is the Assistant Director of the Division of State Lands of the State of Utah; that this Affidavit is made to supplement the earlier affidavit of Charles R. Hansen, as duly executed the 18th day of August, 1975, and filed with the Court; that a copy of a memorandum dated February 11, 1943, from the Commissioner of the General Land Office of the Department of the Interior to the Secretary of the Interior, concerning selections of lieu lands as indemnity for lost school lands, is attached to this Affidavit, both as a photo-copy (barely legible) of the original memorandum and as a legible re-typed copy of said memorandum; that said document is, to the best of my knowledge, information and belief, a true and correct copy of the original thereof; that said document is expressly incorporated herein and by this reference is made a part of this Affidavit.

Dated this 15th day of September, 1975.

/s/ Donald G. Prince  
DONALD G. PRINCE

SUBSCRIBED AND SWORN to before me this 15th day of September, 1975.

/s/ Stanley Green  
Notary Public, Residing in  
Salt Lake City, Utah

**My Commission Expires: Mar. 22, 1977**

UNITED STATES  
DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

Washington

IN REPLY REFER TO:

Phoenix 080399 "A"

MEMORANDUM for the Secretary,

Reference is made to the Solicitor's opinion of October 26, 1942 (M. 31956), approved by the Assistant Secretary November 3, 1942, concerning the authority of the Secretary of the Interior and the degree of discretion he is authorized to exercise in the matter of State exchanges under the provisions of Section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315g).

It is the Solicitor's opinion that the Taylor Grazing Act grants to the Secretary the authority to determine the basis to be used in effectuating the exchanges under the act, and that it is also within the authority of the Secretary to determine the basis (equal value or equal acreage) for exchanges with States. In conclusion, the Solicitor expressed his belief that the regulations (43 CFR 147.2, 147.4, 147.6, and 147.8) should be altered in this respect to reflect the Secretary's authority to consider relative land values in connection with all State exchanges under the Taylor Grazing Act, whether based on equal value or equal acreage as the foundation for a determination by him of the proper basis for the exchange.

Before proceeding with the suggested revision of the regulations, I would like to submit for consideration comments on some aspects of this matter and on the possible effect the proposed revision of the regulations will have.

Section 8 of the original Taylor Grazing Act of June 28, 1934, *supra*, authorized the issuance of patent "for not to exceed an equal value of surveyed grazing district land, or of unreserved surveyed public land" in exchange

for any privately-owned lands within a grazing district; and provided that "Upon application of any State to exchange lands within or without the boundaries of a grazing district, the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately-owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end \* \* \*."

The desire for amendments to the Act were manifested almost immediately upon its approval. Among the amendments proposed and incorporated in H.R. 3019, 74th Congress, which passed the House and Senate, was a provision making mandatory the exchange of State-owned lands for public lands of equal value regardless of whether such exchanges were in the public interest, or whether they were within or outside of established grazing districts. Another provision made an outright grant to the States of the public lands that remained isolated for two years.

The combination of this mandatory requirement as to exchanges with the outright gift of the isolated tracts would make possible an interpretation that might eventually, through manipulating the exchanges, result in practically all of the remaining public lands passing into State ownership. For this and other reasons the President vetoed the bill, with the suggestion that at another session of Congress the matter could be reconsidered and more suitable legislation passed.

The subsequent amendment of the Taylor Grazing Act, approved June 26, 1936, undoubtedly represents a compromise of many divergent schools of thought and probably was the most satisfactory common ground upon which all conflicting forces could be reconciled. It received the favorable endorsement of this Department.

The regulations governing State exchanges which were issued under Circular 1398 provided that the States "should state whether the proposed exchanges are to be based upon equal values or equal areas." However, practically all of such exchanges for the past five years or more, on the States' election, have been on the basis of



equal area. Furthermore, all of the State indemnity selections are, under existing statutes, on the basis of equal area. A promulgation of a different rule for State exchanges under the Taylor Grazing Act, through the proposed modification of existing regulations as to such exchanges, would be of little avail as the selected land in any rejected State exchange application might easily upon the classification of the land under amended Section 7 of the Grazing Act be secured by the State through an indemnity selection. Then, too, it might create such a disturbance and confusion as would result in a demand for a further amendment of the Taylor Grazing Act, reopening the whole subject, and a possible revival of the previous attitude on the part of the States reflected in H.R. 3019, the Secretary's memorandum to the President of August 26, 1935, and the President's veto message of September 5, 1935.

A legal phase of the problem not touched upon by the Solicitor, but which has far-reaching effect upon the change of procedure proposed, involves the third paragraph of Section 8(c) of the Taylor Grazing Act, as amended, reading as follows:

"For the purpose of effecting exchanges based on lands of equal acreage, the identification and area of reserved school sections may be determined by protraction, or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections."

The protraction of unsurveyed base lands is not new; it was provided for in the act of February 28, 1891 (26 Stat. 796; 43 U.S.C. 852, 852), amending Secs. 2275 and 2276 U.S.R.S., for indemnity school land selections, which act with the regulations thereunder (39 L.D. 39 CFR 270.1-270.16), embodies the governing provisions for the adjudication of such selections. Those selections have been based upon equal areas, regardless of the value of the base or selected lands. *California v. Desert Water Etc. Company*, 243 U.S. 415; *Wyoming v. United States*, 255 U.S. 489. In this connection attention is invited to the early instructions of the Treasury Department of

July 11, 1805, to the registers of the Ohio land districts, wherein it was directed that where a fractional section 16 had been disposed of by the United States, it would be necessary in order to replace it to select a tract containing "as near as possible" "a quantity of land equal to the sold fraction." Laws, Instructions, and Opinions, Public Lands, Volume II, page 259. However, the base for an indemnity selection is sometimes a deficiency in the township and cannot be described as land in place (see Sec. 2276 R.S.; 43 U.S.C. 852).

The words "other lands equivalent thereto", found in school land grants to the State of Ohio, made by Section 7 of the act of April 30, 1802 (2 Stat. 173), and in the indemnity act of May 20, 1826 (4 Stat. 179), and the words "other lands of like quantity, found in the indemnity act of February 26, 1859 (11 Stat. 385), and in the codification thereof in Section 2275, supra, have been held to mean the same as the phrase "other lands of equal acreage" embraced in the amendment of that section by the act of February 28, 1891, supra. It is therefore held that the State is entitled to select for lands lost in place, other lands, acre for acre, regardless of price or value. *State of Oregon*, 18 L.D. 343; *State of California*, 32 L.D. 34.

In exchanges of unsurveyed school sections for public lands, through the medium of protraction, as provided for in amended Section 8 of the Taylor Grazing Act, the State gives up no title to the unsurveyed school sections, as it acquires no title to such sections until they are identified by survey. *United States v. Morrison*, 240 U.S. 192. Neither has it a mineral right in such unsurveyed lands which it may reserve. *Utah v. Lichliter*, 50 L.D. 231; *Utah v. Work*, 6 Fed. 2d. 675.

A determination by protraction of school sections merely gives a paper description of the lands for adjudication purposes. The identification of such sections on the ground is not accomplished, and the particular lands are not distinguished from the body of the unsurveyed public lands of which they are a part. Being unidentifiable on the ground, the protracted base lands cannot be ascertained, classified, or evaluated. Therefore, with regard to State exchanges specifically authorized under the



third paragraph of Section 8(c) of the Taylor Grazing Act, the exchanges cannot proceed upon the basis of equal value and must be considered solely on the basis of equal areas.

On December 23, 1942, the Assistant Secretary returned the papers in Phoenix 079725, and other cases, for further consideration in view of the Solicitor's memorandum of October 26, 1942, with the statement that in reconsidering these applications and in submitting our recommendations thereon, as well as applications of a similar nature submitted in the future, information should be given as to the basis for the exchange and why it was selected as the basis for the exchange. It was further stated that the value of the selected as well as the offered lands should be given, but that it was not considered necessary in determining value that a field appraisal be made of the lands embraced in each application for it is believed that an approximate value can sometimes be determined from secondary sources.

This office is of the opinion that the desired objective may be obtained to a large degree by refraining from promulgating the Solicitor's opinion of October 26, 1942, and leaving the regulations as they now stand, the Solicitor's opinion to be regarded as a statement to this office on policy. The General Land Office would thereupon examine all proposed exchange cases involving State-owned base lands, under Section 8(c) of the Taylor Grazing Act, with a view to determining, from a field examination or secondary sources, whether any great disparity in the values of the base and selected lands is present. If it should appear that the difference is so great that the consummation of the proposed exchange would be unconscionable and not in the public interest, negotiations will be opened with the State looking to a withdrawal or a modification of the application. If, on the other hand, the difference in values is not unreasonable, the exchange will be put through. In either event a memorandum reciting all of the findings as to the values involved will accompany the papers submitted to the Department for approval.

/s/ Fred W. Johnson  
Commissioner

## DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Filed Aug. 18, 1975]

Pursuant to Rule 56, Federal Rules of Civil Procedure, defendant moves for summary judgment on the grounds that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

This motion is based upon the complaint, defendant's answer thereto and the statement of uncontroverted facts in the stipulation and pretrial order filed on June 16, 1975.

Defendant will file with the Court and serve upon opposing counsel the memorandum of legal authorities in support of this Motion for Summary Judgment on or before the 15th day of September, 1975. Defendant respectfully requests that a hearing on the Summary Judgment Motions filed by the parties be had upon special setting after the 15th day of September, 1975 at the convenience of the Court.

Respectfully submitted,

/s/ Ramon M. Child  
RAMON M. CHILD  
United States Attorney

/s/ Gerald S. Fish  
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Washington, D.C. 20530  
Telephone: (202) 739-3796

Attorneys for the Defendant

## NOTICE OF APPEAL

[Filed Aug. 2, 1976]

---

Notice is hereby given that the defendant above named hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment and Decree of the above-entitled Court entered June 8, 1976.

/s/ Ramon M. Child  
RAMON M. CHILD  
United States Attorney

## SUPREME COURT OF THE UNITED STATES

No. A-763

CECIL D. ANDRUS, Secretary of the Interior, PETITIONER

v.

UTAH

ORDER EXTENDING TIME TO FILE PETITION  
FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 5, 1979.

/s/ Byron R. White  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 27th day of February, 1979.

SUPREME COURT OF THE UNITED STATES

No. 78-1522

CECIL D. ANDRUS, Secretary of the Interior, PETITIONER

v.

UTAH

ORDER ALLOWING CERTIORARI. Filed June 11, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.



Supreme Court, U. S.  
FILED

MAY 21 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the  
United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, Secretary of The Interior,  
*Petitioner,*

v.

STATE OF UTAH,  
*Respondent.*

BRIEF BY THE STATE OF UTAH  
IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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May 18, 1979

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# In the Supreme Court of the United States

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OCTOBER TERM, 1978

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No. 78-1522

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CECIL D. ANDRUS, Secretary of The Interior,  
*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

---

## BRIEF BY THE STATE OF UTAH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### INTRODUCTION

The Secretary of the Interior has petitioned this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case, which involves certain school indemnity selections filed by the State of Utah.



The State of Utah concurs in the statements by the Secretary with respect to "Jurisdiction" and "Statutes Involved" (pp. 2-3 of Secretary's petition), but disagrees that this is an appropriate case for certiorari.

The real question in this case is whether Congress has conferred on the States the *right to select* unappropriated federal mineral land as indemnity for lost mineral school sections in place, or whether Congress has given the Secretary of Interior unbridled discretion to approve or reject such selections for whatever reasons he deems appropriate. Utah contends that this Court has clearly held that the right of selection is in the States, and that the Secretary has no discretionary authority beyond that of making an administrative adjudication to determine whether the selections are in accordance with the criteria set forth in the school indemnity selection statute, 43 U.S.C. 852. *Wyoming v. United States*, 255 U.S. 480 (1921); *Payne v. New Mexico*, 255 U.S. 367 (1921).<sup>1</sup>

The decision by the court below is reported at 586 F.2d 756 (1978), and a copy is attached to the Secretary's petition as Appendix B, pp. 10a-53a.

This brief might appear to be unusually long for a response to a petition for certiorari. But, if so, such an appearance is somewhat deceptive because points I and II of the Argument, at pages 7-46, are designed to be

<sup>1</sup> Referring to the *Wyoming* and *Payne* cases, the lower court concluded "... we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah." (Secretary's petition, p. 41a).

a complete response to the Secretary's petition. Point III of the Argument, entitled "The Decision by the Court Below is Clearly Correct," and constituting pages 46-104 of this brief, is essentially an argument on the merits of the controversy, and constitutes a reference for whatever selective review the Court might wish to make of that material.

While points I and II are intended to show that there is no persuasive reason for granting a writ of certiorari, point III is intended to demonstrate that there is no conceivable merit to the Secretary's position on the "federal questions" he desires this Court to review. Utah realizes that this Court does not decide the "merits" of a case when it decides whether certiorari should be granted, but if one who petitions for certiorari presents a patently unsound argument with respect to a federal question which it asks this Court to review, then this Court ought not grant certiorari.

Utah firmly believes that is the case here. So did the trial court. And so did the lower court. The unanimous and painstaking decision by the Court of Appeals clearly illustrates a degree of impatience by the court with what it deemed to be far-fetched and irrational arguments by the Secretary.

Utah is concerned primarily about additional delays in obtaining its school indemnity lands. It has been nearly fourteen years since Utah filed the first selections that are the subject of this action, and the Secretary has not yet acted on any of the selections. If the decision of the court below is permitted to stand, the mat-

ter will merely return to the Secretary for an administrative adjudication of the selection lists under the school indemnity statute (43 U.S.C. 852). No one knows how long that will take. And a writ of certiorari by this Court would only add to the delay. Therefore, point III of the Argument has been included to allow this Court to pick and choose for review any parts of it deemed necessary to dispel any doubt that the Secretary's arguments do not have sufficient merit to present a question worthy of review.

## SUMMARY OF CONFLICT IN COURT BELOW

### I. *POSITION OF UTAH*

Utah argued that federal land grants to the States for the support of the common schools created a solemn public trust of critical importance for the support of public schools. This trust was in the nature of a bilateral compact whereby Utah, as a sovereign State admitted into the Union on an equal footing with the Original States, agreed not to tax federal lands within Utah, and whereby the United States, for its part, granted four sections of federal lands within each township to Utah for the aid and support of the public schools, thus compensating Utah for the limited and reduced property tax base available to raise revenues to support governmental functions (specifically, the operation and maintenance of the public school system).

By clear and unambiguous legislation, Congress not only granted and appropriated lands for the orig-

inal school sections in place, but further provided that whenever title to any such school section did not pass to Utah because of federal pre-emption or private entry prior to survey, Utah could select, at its option, an equal acreage of unappropriated federal lands. The congressional grant was in the nature of an offer which Utah could accept or exercise at its election and discretion; and, when so exercised through the filing of school indemnity selection lists, the Secretary of Interior is obligated by law to conduct an administrative adjudication to determine whether such indemnity selections are in compliance with the enabling act and the statutory criteria set forth by Congress in 43 U.S.C. 852.

If there is such compliance, Utah receives equitable title to the selected lands as of the date that the respective indemnity selection lists were filed, and the Secretary must approve such selections by issuing what is commonly referred to as a "clear list," and legal title thereupon vests in Utah. If the selection lists are not in compliance with the applicable statutory criteria, equitable title does not vest in the State by virtue of filing such selections, and the Secretary is obligated to reject such selections.

### II. *POSITION OF THE SECRETARY OF INTERIOR*

The Secretary did not dispute or deny the legal arguments of Utah under the school indemnity selection statutes, but claimed that he had separate and independent authority under Section 7 of the Taylor Graz-

ing Act, 43 U.S.C. 315f, to "classify" all lands within a grazing district to determine whether they are suitable for school indemnity selections. This "classification" is necessary, claims the Secretary, in order to unlock the selected land from the withdrawal effected by Executive Order No. 6910, issued by President Roosevelt in 1934. The Secretary further claimed that he had a very broad range of discretion in making such a classification, and that he is authorized to consider a wide range of public interest factors including the comparative values of the base school lands and the selected indemnity lands, and to classify the land for retention in federal ownership if in his personal view he does not think the public interest would be served by allowing title to pass to the State.

### III. DECISION OF THE COURT BELOW

The United States Court of Appeals for the Tenth Circuit held that the Secretary's arguments were based on a strained and wholly irrational construction of a 1936 Amendment to the Taylor Grazing Act and Executive Order No. 6910 as his source of authority for frustrating the clear mandate of Congress under the school indemnity selection statutes, concluding that there is absolutely no indication in the legislative history of the Taylor Grazing Act, or in the act itself, that Congress intended to require or authorize "classification" under Section 7 as a condition to a State's exercise of its school indemnity selection rights. The Tenth Circuit Court also noted that this Court has clearly held that school indemnity selection rights are to be

exercised in the discretion of the States—not the Secretary of Interior. By contrast, the Secretary cited no case in any jurisdiction that has ever held that the classification procedures of the Taylor Grazing Act apply to school indemnity selections; and the Secretary has also admitted that he has *never* applied the "comparative value" criterion to school indemnity selections, although he now desires to apply such a criterion to Utah's school indemnity selections.

The court below also noted that this Court held in *Wyoming v. United States*, *supra*, that the very act of *filing* the school indemnity selection lists operates as a release, waiver and relinquishment by the State of any further claim to the original school sections in place, and the State receives in lieu thereof equitable title to the selected lands. This is a form of equitable conversion, because the filing of the selection lists results in a simultaneous payment in full to the United States for the selected lands, and no other or further act is required by the State to complete the transaction. The only remaining act is the administrative adjudication to be conducted by the Secretary of Interior.

### ARGUMENT:

#### REASONS FOR DENYING THE WRIT

##### I. FAILURE TO STATE A JURISDICTIONAL BASIS FOR A WRIT OF CERTIORARI

Part V of the Rules of this Court deals with jurisdiction on writ of certiorari. Rule 19 thereunder spec-



ifies considerations governing review on certiorari. While the rule declares that the considerations therein enumerated neither control nor fully measure the Court's discretion, it does make clear that those considerations indicate the character of the reasons that will be considered.

But the Secretary has not even come close to stating a reason for certiorari that is of the nature or character of the considerations specified in the rule. The only argument advanced by the Secretary is that the decision by the court below was in error on a question of federal law. Presumably, this is an effort to bring the Secretary's petition within that part of Rule 19(b) that provides that a writ of certiorari might be granted where a court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court. . . ."

But even this effort is highly suspect—for at least five reasons. First, this Court has already decided the nature, measure and extent of school indemnity selection rights by the States in *Wyoming v. United States* and *Payne v. New Mexico*, both *supra*. And the decision by the court below was in exact accordance with those decisions.

Second, the Secretary now endeavors to create a "new" federal question by arguing that Section 7 of the Taylor Grazing Act (43 U.S.C. 315f), coupled with Executive Order No. 6910, modified the school indemnity selection statute (43 U.S.C. 852) and rendered the

*Wyoming* and *Payne* cases inapplicable to the present controversy. But the Taylor Grazing Act, on its face, does not apply to school indemnity selections, and the legislative history of that act, as shall be seen, makes it entirely clear that the act was not intended to apply to school indemnity selections, nor was Executive Order No. 6910. The court below so held, and found that there was no ambiguity in that act or executive order to leave room for contrary administrative interpretation by the Secretary. Thus, the Secretary's contention that his administrative view of the Taylor Grazing Act is a new federal question is, at best, dubious.

Third, the Secretary's effort to bootstrap his administrative interpretation of the statute to the status of an "important question of federal law" under Rule 19(b) must fall by virtue of a fatal internal conflict and inconsistency in his very argument. This is so because, on the one hand, the Secretary argues that on several occasions over a period of approximately forty years he has interpreted Section 7 of the Taylor Grazing Act and Executive Order No. 6910 as requiring classification of lands by him prior to their availability for selection as school indemnity lands by the States. He further argues that Congress has acquiesced in his interpretation. That argument will be responded to later in this brief, but, for now, it is sufficient to observe that the Secretary has, for more than thirty years, also taken the view that school indemnity selections must be on an acre-for-acre basis, and that comparative value of base lands and selected lands is not a relevant consideration. And, as shall be seen, this view was not only ac-

quiesced in by Congress, but Congress refused to approve a comparative value criterion when the Secretary requested it by way of new legislation. Thus, if it were to be assumed, *arguendo*, that there were any merit to the Secretary's claim of a long-standing administrative interpretation that "classification" under Section 7 was a prerequisite to school indemnity selection, then there would be equal merit to holding the Secretary to his long-standing interpretation that equal acreage, and not comparative value, is the basis for school indemnity selections.

In this regard, it is interesting to note that before the lower court the Secretary combined as a single issue what he now sets forth as two separate issues at page 2 of his petition before this Court. Before the Circuit Court, at pages 2-3 of his primary brief, the Secretary stated the issue as:

Whether the Secretary may exercise the "discretion" granted to him by Section 7 of the Taylor Grazing Act (43 U.S.C. sec. 315f) to classify the 194 selected parcels either for disposal to the State or for retention by the United States on the basis of comparative market value between the selected land and the "base" land they replace.

Thus, in the court below, the Secretary's sole desire was to implement, for the first time ever, a comparative value criterion, and to grasp at Section 7 of the Taylor Grazing Act, in tandem with Executive Order No. 6910, as the vehicle for doing so. It seems to be rather specious for the Secretary to search for an

important federal question based on a long-standing but unfounded administrative interpretation of the Taylor Grazing Act and Executive Order No. 6910 to support the introduction of an entirely new "value" criterion to frustrate the express provisions of the school indemnity selection statute.

Fourth, the Secretary seeks to capture the attention and sympathy of this Court by claiming that the decision below "will have a severe disruptive effect on the management of the public domain." (Secretary's petition, p. 10). This claim would seem to be quite beside the point since Congress has declared the policies and procedures to be followed in school indemnity selections. But, beyond that, the Secretary overstates the potential impact of school indemnity selections on management of the public domain.

In footnote 9 at page 12 of his petition, the Secretary claims that there is a total of 643,000 acres of outstanding school indemnity selection rights held by seven States. This is less than one-tenth of one percent of the federal land. See *One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. x, 1970. Utah is listed in said footnote 9 as having 225,000 acres—which assumes that none of Utah's present selections are valid. Even so, 225,000 acres represents only slightly more than one-half of one percent of the federal land in Utah—the Federal Government still owns two-thirds of the State. (*One Third of the Nation's Land, supra*, p. 327). It is unlikely that honoring school in-



demnity selection rights will have a "severe disruptive effect on the management of the public domain" in Utah or any other State.<sup>2</sup>

<sup>2</sup> There is some question as to whether this claim is really a serious concern of the Secretary or merely an argument of the Solicitor General. Utah has been informed, and believes, that the Secretary of the Interior evaluated the potential impact of outstanding school indemnity selections (by the seven States having such outstanding school indemnity selection rights) on federal management of the public domain and was content to live with and abide by the decision of the lower court.

It seems only fair to point out that Utah has been more than cooperative in meeting with representatives of the Department of Interior to identify lands for school indemnity selection that would permit effective land management by both the State and the Department of the Interior. In fact, the Department recommended the areas selected by the State. It also seems appropriate to point out why Utah waited nearly ten years after filing its first selections before bringing this lawsuit. These two matters were clearly explained in the affidavit of Charles R. Hansen, Director of the Utah Division of State Lands, filed in support of Utah's motion for summary judgment—and not controverted in any way by the Secretary of Interior. This affidavit was part of the record before the Tenth Circuit Court, and its pertinent parts are as follows:

CHARLES R. HANSEN, first being duly sworn upon oath, deposes and says that he is the Director of the Division of State Lands of the State of Utah, and that:

1. During numerous meetings between 1966 and 1974 between representatives of the Utah Division of State Lands and representatives of the office of the State Director of the Bureau of Land Management, held to discuss the adequacy and status of Utah's oil shale selections as indemnity for lost school lands (which are the subject of the present litigation), Utah was advised that there was no objection or question on the part of the Federal Government with respect to whether such selections were in compliance with all statutory and regulatory requirements pertaining thereto, with the exception of the advisability of the State of Utah making selections which would constitute "manageable blocks" of land, and in this regard Utah did thereafter file such selections in such a manner as to satisfy all suggestions offered by the Bureau of Land Management. The final suggestions by the Bureau in this regard were explained in a meeting held December 19, 1968, attended by myself and members of my staff as representatives of the State of Utah and by Mr. Robert D. Nielsen, as the State Director of the Bureau of Land Management, and members of

Fifth, the Secretary again endeavors to alarm the Court by advising that the decision below "will prove quite costly to the United States." (Secretary's petition, p. 10). To reinforce this notion the Secretary advises that Colorado "presumably" will now be able to select the lands in that State on which prototype oil shale leases have been issued and where the lessees are obligated to pay \$328 million in bonus payments. (Secretary's petition, pp. 10-11, and footnote 7 on page 11). This is highly misleading.

Under the clear holding of the court below, no rights attach on the part of a selecting State prior to

## <sup>2</sup> Continued

his staff as representatives of the Bureau of Land Management. The suggestions offered by the Bureau were formally approved by the Utah Board of State Lands on January 15, 1969, and in compliance therewith Utah subsequently prepared and filed the selection lists dated December 19, 1969 (25,583.20 acres), February 17, 1970 (38,058.81 acres), November 8, 1971 (11,044.87 acres), November 15, 1971 (11,977.49 acres), and November 19, 1971 (12,216.59 acres), and this brought the total pending state selections on oil shale lands to 157,255.90 acres.

2. On numerous occasions I have discussed the status of these pending applications with appropriate representatives of the Federal Government, including discussions with Harrison Loesch, former Assistant Secretary of Interior, and with Reid Stone, Federal Oil Shale Coordinator, and on each occasion I was advised that federal action on the State selections was awaiting development of the Federal proto-type program for oil shale leasing, and that as soon as that program was developed to the point that the Federal Government was ready to issue the original leases, they believed that the selection lists as filed by Utah would be approved and clear lists issued. It was not until February 14, 1974, that Secretary Rogers Morton formally advised Governor Calvin Rampton that the Department of Interior intended to apply a comparative value test to determine whether the oil shale lands selected had substantially more value than the base lands for which selection was made.



the date of selection, and Colorado has not selected any lands subject to prototype leases. The Colorado lessees have already paid to the United States the full amount of the bonus bid required to be paid in cash (60%); the remaining amount (40%) may be credited against development costs, as provided in the leases. Thus, if Colorado could select those lands at all—and there is some question if it could—the selection would not be effective until the termination of the existing leases, and the State would not directly receive any of the lease revenues.

Moreover, there is no evidence that oil shale lands are more valuable than the original grants in place. While there has been an interest in oil shale development for more than sixty years, the fact is that not one gallon of shale oil has yet been produced at a profit, and there is no assurance that one ever will be. On the other hand, land appropriated in Utah before statehood and survey (where Utah was denied title) includes some of Utah's most valuable metals and hydrocarbons.

This, of course, is beside the point to the extent that the legal question is merely whether the Secretary is authorized to compare values, and he has not yet done that. But the Secretary repeatedly speaks, in his petition, of the huge, unconscionable windfall that would accrue to Utah if the current selections are honored. These assertions reveal a serious lack of knowledge on the part of the Secretary concerning history and geography. The plain fact is that Utah has no

chance of receiving school lands having value anywhere near the value of the original grants in place.<sup>3</sup>

<sup>3</sup> History records a long and arduous effort by Utah to try to obtain its school land grants—including grants in place as well as indemnity selections. This litigation is just one more chapter in that effort.

A brief historic summary of this effort will be illustrative. The school land grant contained in Utah's Enabling Act was silent as to whether the grant included mineral lands. The enabling acts of most other "public land" States expressly excluded mineral lands from the school land grants, and this Court held in *United States v. Sweet*, 245 U.S. 563 (1918), that the same was true with respect to Utah, explaining that lands "known" to be valuable for minerals at the time title otherwise would vest in the State were excluded from the grant. This Court thus followed the earlier lead of *Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 102 U.S. 167 (1880) and *Deffeback v. Hawke*, 115 U.S. 392 (1885). In the latter case this Court explained:

We say "land known at the time to be valuable," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. . . . We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits may be discovered. . . . (115 U.S. at 404).

Despite the *Sweet* decision, the Department of Interior refused to recognize state title to many school land grants in place even though those lands were not "known" to be valuable for minerals. This was accomplished through an administrative doctrine devised by the U.S.G.S. within the Department and known as "geologic inference," which was nothing more than geologic speculation. Under this doctrine States were denied title to school sections in place if it could be assumed, inferred or believed that a school section might have mineral value by virtue of the fact that other lands in the area were "known" to have mineral value. Thus, if other lands were known to have mineral value, a "geologic inference" could be drawn that the school section also might have mineral value.

This doctrine caused Nevada and Utah, with support from other Western States, to go to Congress for relief, and that relief came in the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. 870-871.

Utah, Arizona and New Mexico were granted four sections in each township, rather than the traditional two, because of their large areas of arid, barren desert. Title could not pass until the lands were surveyed. Surveys were delayed, and, in the meantime, the Federal Government reserved the choice areas for national parks (Utah has five national parks, which is more than any other State), national forests, reservoir sites, and other purposes. Lands that were near streams, or that were susceptible to irrigation or other development, were

### <sup>3</sup> Continued

And, of course, the States could not select mineral lands as indemnity, even though the lost base lands were mineral, until 1958, when Congress amended 43 U.S.C. 852 by the Act of August 27, 1958, 72 Stat. 928.

The present litigation was prompted by the Secretary's recent effort to frustrate Utah's rights under the 1958 amendment by seeking to reject all school indemnity selections which the Secretary believes are more valuable than the base lands in place for which the selections are made.

And there is yet another area where the Government has seriously short-changed Utah in its school land grant. Utah's Enabling Act granted to Utah school trust lands consisting not only of sections 2, 16, 32 and 36 in each township (Section 6 of the Act of July 16, 1894, 28 Stat. 107), but also 5% of the proceeds derived from the sale of all of the remaining federal land within the State (Section 9 of the Act of July 16, 1894, 28 Stat. 107). Congressional policy later changed to one of retaining federal lands in federal ownership, and the Government has thus retained ownership of two-thirds of all of the land within the State of Utah. But in 1894, when Utah's Enabling Act was passed, the congressional policy was one of disposing of the public domain, and it was reasonable for Utah to assume that it would actually receive the entire school land grant specifically and clearly established by the "bilateral compact" between Utah and the United States. Since the United States still owns 35,060,194 acres in Utah (*One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. 327, 1970), this means that Utah's permanent school fund has been denied the proceeds that would have been derived from the sale of 1,753,010 acres of such federal land (the 5% granted by Section 9 of the Enabling Act).

taken by private entry. Thus, by and large, when surveys were completed the school lands in place received by Utah were the remote and barren lands that nobody wanted, ordinarily having no value except for marginal grazing. True, Utah could select indemnity lands for those school sections lost by pre-emption and reservation, but Utah could only select from the remaining "unappropriated" barren desert. Furthermore, prior to 1958 Utah could not even select "mineral" lands in the desert, even though its base lands were mineral.

The basic federal purpose in granting to Utah sections 2, 16, 32 and 36 in each township was to give the State a balanced and representative ownership on a statewide basis. This basic federal policy has always been well understood. When Congress was considering S. 2517, which became the 1958 Amendment to 43 U.S.C. 852, the Department of Interior reported to Congress that:

*In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965) (Emphasis added).*

But this policy was not realized in Utah. When Utah was compelled to select lands as indemnity for sections in place having a value much higher than the selected lands, the Secretary never objected on the ground that Utah was being short-changed. Even now,



under the Secretary's new policy on comparative value, there is a totally one-sided view. The Secretary desires to reject mineral land indemnity selections when the selected land is more valuable than the base mineral lands—but the Secretary is perfectly willing to approve selections where the base lands are more valuable than the selected lands—and, in that event, the Secretary seems to claim that he cannot make any adjustment to compensate the State for the federal windfall—because, the Secretary argues, once he has “unlocked” the public domain by approving lands as suitable for school indemnity selection, he then is bound by the “equal acreage” provisions of 43 U.S.C. 852.

Much of what has been said above is wide of the mark with respect to the issues properly before the Court. However, it is not inappropriate in light of the Secretary's bald and repeated efforts to induce the Court to grant certiorari by making irrelevant but false claims about unfair windfalls to the State of Utah.

In short, the Secretary has not stated a legitimate jurisdictional basis for a writ of certiorari.

## II. *RESPONSE TO ARGUMENTS ADVANCED BY SECRETARY*

### A. *Preface*

It is abundantly clear that the Secretary of the Interior desires to reject Utah's school indemnity selections by implementing a “comparative value” test and endeavors to justify such action under “classification” authority allegedly derived from Section 7 of the Tay-

lor Grazing Act, and necessitated by an alleged withdrawal of lands under Executive Order No. 6910. This controversy came into focus when Tracts U-a and U-b in Utah were leased for oil shale development in 1974 as part of a federal prototype oil shale leasing program, resulting in a combined “lease bonus” bid of approximately \$120 million, with 20% of the bonus to be paid in cash each year for the first three years and the last two “payments” to be credited against development costs incurred by the lessees.

Prior to publishing notice for competitive bidding on the prototype tracts, the Secretary of Interior—aware that the proposed prototype tracts had previously been selected by Utah as school indemnity lands, and also aware that Utah claimed equitable title to such lands—requested the Governor of Utah to enter into an agreement with the United States whereby Utah would consent to the issuance of leases by the Secretary, and, if Utah prevailed in its claim to equitable title, Utah would accept the leases as lessor and would honor the terms of the leases. Such an agreement was executed. (Secretary's petition, pp. 52a-53a).

The Secretary claims that the “comparable value” test derived from a policy established by his predecessor Secretary Stewart L. Udall on January 18, 1967, and that the policy has “won congressional approval.” (Secretary's petition, p. 23). Nothing could be farther from the truth, as will be seen below.

### B. *The “Udall Memorandum” on Comparative Value*



The origin of the comparative value test is somewhat curious. On December 15, 1966, the Director of the Bureau of Land Management sent an intradepartmental memorandum to the Secretary of Interior through the Assistant Secretary for Public Land Management. This memorandum raised questions as to the comparative values of base lands and selected lands, and proposed certain value criteria to be met before indemnity selections received approval, and concluded by stating:

Your approval of this memorandum will constitute your approval of the suggested guidelines.

At the end of the memorandum a space was provided for the signature of the Secretary, and it apparently was signed on January 18, 1967, by Stewart L. Udall, then the Secretary of the Interior (R., Vol. III, pp. 49-51). While the guidelines contained within the memorandum have never been implemented in connection with any school indemnity selections, even though the memorandum is more than twelve years old, it has become the sole source of the Secretary's "policy" for employing such a comparative value test.

It seems that the Udall memorandum was buried somewhere in Department of Interior files for more than seven years. It was the best kept secret in Washington. No one outside of Interior was advised of its existence. Apparently it was never published in the Federal Register, was not the subject of any rule-making procedures, and was not implemented by any regulations published in the Code of Federal Regulations. It apparently has

never to this day been utilized in any so-called "classification" of school indemnity selections. It is particularly interesting that, as recently as 1976, the Interior Department's own Board of Land Appeals was not aware of, and could not find, the Udall Memorandum. See *State of New Mexico*, IBLA 75-582, 24 IBLA 135, 137 (March 8, 1976).

And, equally interesting, is the fact that more than five years after the Udall memorandum allegedly became official Department "policy," Secretary of Interior Rogers Morton was not aware of its existence. On May 23, 1972, Secretary Morton wrote to Utah's Governor Calvin L. Rampton concerning the very school indemnity selections now in dispute, and assured Utah that to the extent the matter was within his discretion he would approve Utah's selections, and would disapprove them only if there was some legal "barrier" which prohibited approval:

The opinion of the Attorney General has been requested concerning the filings for selection of mineral lands by the State of Utah. The Attorney General has been asked whether there is any legal barrier to the approval of the filed selections of the State of Utah and what point in time the rights of the State vest, i.e., at the time of filing for selection or at the time of approval of such selections.

...

... *If the Attorney General finds that there is no legal barrier to the approval of the State selection, then this Department will initiate the administrative steps necessary to accomplish that approval.*

*With this information and assurances at your disposal, will you withdraw any objection to the proposed leasing of two tracts of land in Utah for oil shale development? (Emphasis added; R., Vol. III, p. 68).*

If Secretary Morton had been aware of any "comparative value" policy that would have given him discretion to reject the selections, he surely would have mentioned it when he gave Utah his "assurances" that he would initiate the necessary administrative steps to accomplish approval of the indemnity selections.<sup>3a</sup>

In any event, Utah was never advised as to when, if ever, the Secretary received the requested opinion from the United States Attorney General. If such an opinion was prepared, it has never been made public.

It was not until February 14, 1974—more than seven years after the Udall memorandum was signed—that the "comparative value" policy first saw the light of day. On that date, Secretary Morton wrote a further letter to Governor Rampton concerning Utah's school indemnity selections. Utah was startled to learn of the "comparative value" policy, as explained by Secretary Morton:

As you know, the Department of the Interior has not as yet acted upon the State's applica-

<sup>3a</sup> If the Secretary really believed that he was authorized or required to "classify" school indemnity selections under Section 7 of the Taylor Grazing Act, he certainly would have mentioned that fact to Governor Rampton in his May 23, 1972 letter; and he certainly would not have asked the United States Attorney General if "the rights of the State vests" at the date of selection.

tions. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. §315f (1974), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate to advise you that we will apply the above-mentioned policy in that adjudication. (R., Vol. III, p. 70).

It is perhaps revealing that the Secretary now characterizes the February 14, 1974 letter as an "announcement" of the Udall memorandum. (Secretary's petition, p. 5). Utah initiated this litigation less than three weeks after receipt of Secretary Morton's February 14th letter.

It seems significant that the Secretary has never explained how comparative values would be determined. Any appraisal of values under the Taylor Grazing Act would be conducted by the Bureau of Land Management, and could consider surface estate values only,

since mineral deposits are within the jurisdiction of the United States Geological Survey under 43 U.S.C. 31(a). Moreover, mineral deposits cannot be evaluated by a "walk-on" inspection, but would require extensive drilling and blocking, at a cost of untold millions of dollars. There is no evidence that the Secretary has ever requested Congress to fund such a program. Indeed, the lower court was most skeptical as to whether the Secretary even had an established "policy" that could be implemented in any effective way:

At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are nonexistent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. (Secretary's petition, pp. 18a-19a).

Aside from the very dubious nature and status of the Udall memorandum as an administrative tool, it is important to emphasize that the "policy" embraced in that memorandum is clearly contrary to law and has been expressly rejected by Congress.

First, 43 U.S.C. 851 expressly grants and appropriates "other lands of equal acreage" as indemnification for lost school lands. The Udall memorandum would reverse this congressional grant, and by an illegal administrative fiat amend the statute to read "other lands

of equal value" are appropriated to satisfy school indemnity rights.

Furthermore, Congress has provided its own measure of fair value in indemnity selections by authorizing States to select mineral lands *only* when lost school lands are also mineral in character. If Congress had intended to authorize the Secretary to employ an additional value criterion, it would have expressly done so, as it did in Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), wherein the Secretary is authorized to utilize either equal acreage or equal value as the basis for approving *exchanges* of state land for federal land.

As indicated earlier, the Secretary has never applied a comparative value criterion in acting on any prior school indemnity selections. The Secretary claims as his source of authority for the Udall memorandum the 1936 Amendment to the Taylor Grazing Act, and so he claims to believe that he has had this authority for more than forty years—and yet he has never used it. Prior school indemnity selections, as filed by Utah and other States, have never been subjected to such a comparative value test. But now, for the first time, the Secretary desires to initiate this practice to deny Utah's school indemnity selections.

And it is of substantial significance that the Secretary has repeatedly asked Congress for authority to employ a comparative value test when determining whether school indemnity selections are in accordance



with congressional requirements. Congress has steadfastly refused to grant the Secretary such authority. Early in 1963, Congressman Wayne Aspinall (D.Colo.) introduced H.R. 16, which would have provided that school indemnity selection of mineral-rich land would be authorized only when the lost lands were of equal value. If the bill had passed there would have been a question as to whether it was unconstitutional as a unilateral amendment of a bilateral compact between sovereigns, but the bill was tabled. And that was that!

Then, in 1966, when H.R. 5984 was introduced to amend 43 U.S.C. 852 by allowing States to select unsurveyed lands as indemnification for lost school lands, the Department of Interior sought to have the bill amended to require equal value rather than equal acreage for school indemnity selections. In rejecting any such amendment, the Senate Committee on Interior & Insular Affairs noted:

The Department of the Interior, in its report which is included below, indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leasable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of H.R. 5984, rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that pub-

lic land issue. (Senate Report No. 1213, 89th Cong., Second Sess., 1966, at p.2).

So, without the Department's requested "equal value" amendment, H.R. 5984 was duly enacted into law as the Act of June 26, 1966, PL 89-470, 80 Stat. 220, amending 43 U.S.C. 852.

The Department of Interior's change of position in registering "no objection" to enactment of PL 89-470 without the Department's previously requested amendment to provide "an equal value concept" drew the attention of the lower court:

Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (*United States v. Union Pacific Railroad Company*, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. *State of Wyoming v. United States*, 255 U.S. 489 (1921). We deem this to be particularly significant in recognition that the sole specific Congressional reference in §852(a)(1), *supra*, relates to lands "... mineral in character may be selected by a State [if] ... the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; ...". No reference whatsoever is made to the value of the "minerals in character." *This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have*

*included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing "acre for acre" selected basis. U.S. Code, Cong. & Ad. News, 2nd Session, Volume II, p. 2324 (1966). (Secretary's petition, p. 20a; Emphasis added).*<sup>4</sup>

Congress was directly confronted with the "equal acreage" rather than "comparative value" basis for school indemnity selections on other occasions. In 1958 the House Committee on Interior and Insular Affairs carefully considered the matter in connection with S. 2517, which became an amendment to 43 U.S.C. 852. The Committee concluded that the federal interest was adequately protected by the equal acreage criterion:

*The Federal interest is amply protected by S. 2517. Mineral lands may be selected as indemnity lands only for other mineral lands. Lands on a known geologic structure of an oil and gas field may be selected as indemnity only for lands similarly situated. And lands subject to mineral lease or permit may be selected only if all lands subject to the lease or permit are chosen and only if none of the lands is in a producing or producible status. The character of the lands for which indemnity is sought will be determined as of the date of application for selection. (1958 U.S. Code Cong. and Adm. News, p. 3964). (Emphasis added).*

And, at that time, the Department of Interior submitted a report to Congress that clearly recognized the

<sup>4</sup> It was in December 1966—the very year that Congress rejected (and the Department withdrew its request for) an equal value criterion—that officials in the Department of Interior apparently drafted the "Udall memorandum."

right of the States to select school indemnity lands of equal acreage, as distinguished from various exchanges under other laws where equal value was the measure of the exchange:

Under other statutes a State . . . may exchange . . . lands of equal value, but, naturally, a State would prefer to use lands of little value as base for indemnity selections rather than for exchanges. The reason for this is that in making indemnity selections lands are taken on a equal acreage basis, but under the Taylor Grazing Act, as amended, (43 U.S.C., sec. 315 et seq.), and the Forest Exchange Act, as amended, (16 U.S.C., secs. 485-486), exchanges are on a basis of equal value.<sup>4a</sup>

The direction in which self-interest would lead a State in such a situation is obvious. Any objection to permitting a State to select lands on a basis of equal acreage would be greatly increased if it were to be permitted to select mineral lands in lieu of non-mineral lands which had been lost. In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965).

Of course, the 1958 Amendment to 43 U.S.C. 852 did not, and had never purported to, authorize the

<sup>4a</sup> The Department thus makes it absolutely clear in this 1958 report not only that school indemnity selections must be on the basis of equal acreage rather than equal value, but, perhaps more important, that such selections have nothing at all to do with the Taylor Grazing Act.

States to select mineral lands as indemnity for lost non-mineral lands. The requirements for mineral selection were as explained by the House Committee on Interior and Insular Affairs, quoted above.

In view of the clear and repeated insistence by Congress that school indemnity selections be on the basis of equal acreage, it is difficult to see how the Solicitor General can now represent to this Court that the policy of the Udall memorandum, though never implemented, is a "practice" that has "won congressional approval." (Secretary's petition, p. 23). The whole basis for such a representation is an alleged letter—not in the record—written in January of 1974 by two Senators to the Secretary of the Interior, apparently referring to the Udall memorandum, and declaring that "we agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a 'gross disparity' of value between the lost lands and the selected lands." This letter apparently was written one month before that "policy" was "announced" to Utah in Secretary Morton's letter to Governor Rampton on February 14, 1974. Apparently the two Senators were not too familiar with the Udall policy, since they thought it was promulgated in 1965, rather than in 1967. (Secretary's petition, pp. 23-24).

More to the point, however, is the fact that the Secretary relies on the 1936 Amendment to the Taylor Grazing Act as his sole source of authority for promulgation of the Udall memorandum, and the further fact that the Secretary relies solely on a letter written by

two Senators thirty-eight years after that statute was enacted, to show that the Udall memorandum is a "practice" that has "won congressional approval." That argument is nothing short of absurd.

And the Secretary is not being candid with the Court with respect to the *actual* practices that his Department has followed. The Secretary's present position in support of an equal value criterion is entirely inconsistent with everything that has gone on previously, both before and after the 1936 Amendment to the Taylor Grazing Act. The cases and departmental decisions were entirely clear and consistent in recognizing equal acreage, rather than equal value, as the measure for indemnity selections. See *Mullan v. United States*, 118 U.S. 271 (1886); *California v. Deseret Water Company*, 243 U.S. 415 (1915); *United States v. Morrison*, 240 U.S. 192 (1916); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Wyoming v. United States*, 255 U.S. 489 (1921); and 52 I.D. 273 (February 1, 1928). The same result has obtained since the 1936 Amendment: see *State of California*, 67 I.D. 85 (February 29, 1960); and 43 C.F.R. 2621.0-3.

Of particular significance is the fact that on September 14, 1962, Thomas J. Cavanaugh, Associate Solicitor for Public Lands, advised the Director of the Bureau of Land Management with respect to the legality of considering disparity of values in school indemnity selections. Associate Solicitor Cavanaugh, it will be noted, commented on both the 1958 Amendment to 43



U.S.C. 852 and the Department's report thereon. And his opinion was firm and conclusive:

In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered. . . .

When the state lieu selection statutes were last amended in 1958, it was clear that Congress recognized the practice by the states of offering as base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law. . . . Accordingly, it is clear that the 1958 amendments to the state indemnity selection laws not only reaffirmed the position of this Department that discrepancies in values between offered and selected lands was not to be considered, but also intended the equal acreage rather than equal value test be carried forward in the case of mineral lands. Therefore, the mere fact that the mineral value of the selected lands far exceeds that of the offered lands may not operate as a bar to the selection. (R., Vol. III, pp. 42-43).

What more need be said? Nothing perhaps, except that the foregoing records within the Department are entirely inconsistent with the Department's present argument that all federal land within twelve Western States was locked up and unavailable for school indemnity selection by virtue of Executive Order No. 6910, issued in 1934 (see Section II.D of this brief, *infra*).

### C. *Congressional Consideration of Classification under Section 7*

In his petition, the Secretary makes repeated claims that the decision by the court below overturns an administrative practice that the Department of Interior has followed for nearly half a century, with the approval of Congress (see, *e.g.*, Secretary's petition, p. 20). The "practice" is "classification" of land under Section 7 of the Taylor Grazing Act to free it from the withdrawal of Executive Order No. 6910, issued in 1934. This argument is not persuasive, for a number of reasons.

First, as the preceding section of this brief has demonstrated and documented, the Secretary now desires merely to implement for the very first time a "comparative value" policy as set forth in the Udall memorandum, and to invoke an alleged "classification" authority under Section 7 of the Taylor Grazing Act as the mechanism for doing so. And it has been shown that such a policy is directly contrary to existing statutes, and that Congress has repeatedly and steadfastly refused to grant to the Secretary authority to implement such a policy.<sup>5</sup>

<sup>5</sup> The Secretary repeatedly endeavors to diminish the nature and status of the school trust lands program. For example, on page 10 of the Secretary's petition it is said that "patents" must issue for such lands, from the United States to the State.

Surely, the Secretary knows that patents do not issue from the United States to convey title to lands selected as school grant indemnification. As this Court held in *Wyoming v. United States*, *supra*, equitable title to the land selected vests in the State at the date of selection by virtue of the respective enabling act and also by 43 U.S.C. 851-852. The Secretary's administrative adjudication of the selections under 43 U.S.C. 852

Second, Section III of this brief, *infra*, demonstrates in considerable detail why the Taylor Grazing Act has no reasonable ambiguities with respect to school indemnity selections—it simply does not apply to such selections. The lower court was plainly correct in so holding. While Utah acknowledges that courts ordinarily accord some deference to an administrative interpretation of a statute by an agency charged with administration of the statute, that rule applies only where there is a “reasonable” basis in law for the agency’s interpretation. The courts will not defer to an administrative interpretation that is not reasonable:

The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a “reasonable basis in law” . . . But the courts are the final authorities on issues of statutory construction, . . . and “are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” . . . (*Volkswagenwerk v. FMC*, 391 U.S. 261, 272 (1968); citations in quote omitted).

**Continued**

merely determines whether the selection under adjudication is in accordance with the statutory criteria of Section 852, and, if so, he so certifies by a “clear list” and this has the effect of perfecting fee title in the State. (See 43 U.S.C. 859). Clear lists never contain any language purporting to convey or grant title, as would a patent or other instrument of conveyance. The Secretary never has, and does not now, issue “patents”—he merely certifies by a clear list. The reference to “patents” in the Secretary’s petition is a serious misconception of the basic nature of the school indemnity program.

See also *N.L.R.B. v. Brown*, 580 U.S. 290 (1965); *Moor v. County of Alameda*, 411 U.S. 743 (1973); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Circ. 1971).

It is significant that the Secretary, in his petition before this Court, offers not one word of legislative history to support the Interior Department’s unreasonable interpretation of the 1936 Amendment, but merely requests this Court to defer to such interpretation. That is not good enough! The Secretary must, as a minimum, show that the Department of Interior’s interpretation has a “reasonable basis in law,” and this he has utterly failed to do. And the lower court properly so held.

Third, there is no persuasive indication that Congress ever really considered the Secretary’s administrative interpretation of Section 7 of the Taylor Grazing Act. At pages 19-20 of his petition, the Secretary cites two congressional committee reports which incorporate parts of letters sent by the Secretary to the congressional committees, reciting that amendments to 43 U.S.C. 852 would not change Section 7 of the Taylor Grazing Act or the Secretary’s practice thereunder.

But this appears to have been a perfunctory act by the congressional committees, since there appears not to have been one word of discussion or debate—either on the floor of Congress or in committee hearings—to indicate that school indemnity selections should be sub-



ject to secretarial classification under Section 7. Contrasted with the intense congressional attention and scrutiny given to school land grants and indemnification procedures, the Secretary has advanced a very weak argument. It is entirely unreasonable to assume that Congress intended—even if it could lawfully do so—to emasculate the school trust grants without a single word of discussion or debate concerning such an emasculation.

Further, as shown above, even a congressional acquiescence in an agency interpretation of a statute will not be adopted by the courts if there is no reasonable basis in law for such an interpretation. Where, as here, the agency interpretation is unreasonable, it is invalid, as the lower court correctly concluded.

A case which presented a much more persuasive factual basis for judicial deference to congressional acquiescence in an administrative interpretation of a statute was recently decided by the United States Court of Appeals for the Ninth Circuit. In *United States v. Imperial Irrigation District*, 559 F.2d 509 (1977), it was held that the Secretary of the Interior's administrative interpretation of the excess lands provision (160-acre limitation) of the Omnibus Adjustment Act of 1926 was not binding or controlling on the courts. The lower court (322 F.Supp. 11) had held that an administrative decision of Secretary of the Interior Ray Lyman Wilbur, issued February 24, 1933, was binding on the court because (1) it had been followed consistently for nearly forty years, (2) the legislative history of the

Omnibus Adjustment Act of 1926 supported the Secretary's opinion, (3) Congress repeatedly had been made aware of the Secretary's opinion and seemingly acquiesced in it, and (4) very substantial investments had been made by private parties in reliance on the Secretary's opinion.

Those facts and contentions were set forth in considerable detail at 322 F.Supp. 15-27. A careful review of those facts will demonstrate that there was genuine, active and repeated congressional acquiescence in the administrative interpretation. Nevertheless, the Ninth Circuit Court held that the Secretary's opinion in 1933 was an incorrect interpretation of the law and would not be followed by the court:

... The appropriate deference to be accorded an administrative construction of a statute is that a 'consistent and longstanding' interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to 'considerable weight' but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). (559 F.2d 509 at 539).

In the *Imperial* water controversy, a later Secretary of the Interior had determined that a forty-year-old administrative opinion of a predecessor Secretary was in error and should be reversed, but the trial court said that the later Secretary of the Interior could not



change the administrative interpretation adopted by the earlier Secretary. The Court of Appeals for the Ninth Circuit reversed on appeal. That decision is clearly sound, as is the decision of the Tenth Circuit in this case.<sup>6</sup> See annotation 39 L.Ed.2d 952 *et seq.*

D. *The Pickett Act and Executive Order No. 6910*

The Secretary argues in his petition that the lands selected by Utah in this case were not available for selection unless "unlocked" by classification under Section 7 of the Taylor Grazing Act because all unappropriated public domain in Utah had been withdrawn in 1934—and still remains withdrawn—for classification and examination by Executive Order No. 6910, issued under the Pickett Act.

The Pickett Act of June 25, 1910, was codified as 43 U.S.C. 141 prior to its repeal in 1976, and provided as follows:

The President may, at any time in his discretion, *temporarily withdraw from settlement, location, sale, or entry* any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classi-

<sup>6</sup> It also is illustrative to mention *United States v. California*, 332 U.S. 19 (1947), where this Court held that there would be no judicial deference to administrative interpretations so as to prevent the United States from claiming ownership of the marginal seabed off the California coast, including all minerals and natural resources therein, notwithstanding the fact that federal officials for many years had taken the administrative position that ownership was vested in the State of California. That administrative view was erroneous and was rejected by this Court.

fication of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (Emphasis added).

The Secretary argues that Executive Order No. 6910, made under authority of the Pickett Act, withdrew the land described therein so as to prevent school indemnity selections unless and until the land was classified as suitable for disposition under Section 7 of the Taylor Grazing Act. That order was issued by President Roosevelt on November 26, 1934, expressly identified the Pickett Act as authority for the order, and provided, in part, that:

... it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, . . . .

Thus, this executive order withdrew 100% of the "vacant, unreserved and unappropriated" public land in twelve Western States, for classification "of the most useful purpose to which said land may be put in consideration of the provisions" of the Taylor Grazing Act of 1934.

The Secretary now raises two legal questions by asserting that Executive Order No. 6910 prevents school indemnity mineral selections. The first is whether the Pickett Act authorized any withdrawals that would defeat school indemnity selections; and the second is whether Executive Order No. 6910 intended to withdraw lands from school indemnity mineral selection.

With respect to the first question, it will be noted that both the Pickett Act and Executive Order No. 6910 apply only to withdrawals from "settlement, location, sale or entry." There is no authority to withdraw from school indemnity selection. Selections are not settlements. They are not sales. They are not entries. They are simply school indemnity selections that appear to be beyond the reach of the Pickett Act and Executive Order No. 6910 promulgated thereunder. But the lower court found it unnecessary to decide whether land withdrawals by virtue of an executive order promulgated under the Pickett Act conceivably could defeat school indemnity selections, because it was entirely clear to the court that Executive Order No. 6910 sought to accomplish no such purpose.

In his petition, the Secretary ponders the question as to what kinds of withdrawals might prevent school indemnity selection:

What is not entirely clear . . . , however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection? (Secretary's petition, p. 14).

On page 15 of his petition, the Secretary then purports to answer his own question by suggesting that any type of withdrawal will prevent school indemnity selections:

If any doubt remained, it was put to rest by *United States v. Wyoming*, 331 U.S. 440 (1947), where a Pickett Act withdrawal of lands, *without the creation of any special-purpose reservation*, was held to defeat an original school grant. (Emphasis added).

But Utah does not read *United States v. Wyoming* as has the Secretary. There, the withdrawal was by virtue of a Presidential order issued December 6, 1915, which specifically reserved the lands as part of Petroleum Reserve No. 41. (331 U.S. at 442, 444).<sup>7</sup> This, then, was in fact a "special-purpose" reservation, and was a far cry from the general withdrawal for purposes of classification under Executive Order No. 6910.<sup>8</sup>

The Secretary's argument is so vulnerable that it is difficult to choose among potential starting points. Perhaps the most shocking and absurd result of such an argument is that *every acre* in the twelve States identified in Executive Order No. 6910 would have been

<sup>7</sup> While the Presidential Order was issued December 6, 1915, the survey was not made and approved until July 27, 1916, more than seven months later. Thus the school section in place could not have passed to Wyoming until July 27, 1916, and prior to that time the section was withdrawn and placed within Petroleum Reserve No. 41, and thus could not pass to the State (331 U.S. 442 et seq.)

<sup>8</sup> In the trial court and also in the court below the Secretary relied on Executive Order No. 5327, which was issued by President Hoover on April 15, 1930, and which was a general withdrawal of certain lands for classification. But, before this Court, the Secretary seems to have abandoned that argument.

locked up since 1934 so that the States could receive *neither their school land grants in place nor indemnity selections* for lost base lands, unless the Secretary decided—unaided by any statutory criteria or guidance—that the school lands so granted were “suitable” for disposition.

Under the Secretary’s argument, the seeming innocuous language in Executive Order No. 6910, expressly intended only to implement the purposes of the Taylor Grazing Act, would have the effect of repealing the school land grants as set forth in the enabling acts of the various “public land” States, and substituting therefor an entirely different system whereby the Secretary would have the exclusive discretion to determine whether the States would receive their school land grants in place for all lands surveyed after 1934, and whether school indemnity selections after 1934<sup>9</sup> should

<sup>9</sup> The Secretary’s position with respect to the date the public domain allegedly became “locked up” and immune from school indemnity selection is not entirely clear.

In the lower court it seemed that the Secretary relied on the date of April 15, 1930, which was the date of President Hoover’s Executive Order No. 5327. Before this Court, the Secretary sometimes seems to argue for the date of June 28, 1934, which was the date that the Taylor Grazing Act became law; and at other times he seems to rely on June 26, 1936, which was the date that Section 7 of the 1934 act was amended.

But most of the time the Secretary’s argument seems to be that the lands became “locked up” by Executive Order No. 6910, issued November 26, 1934, under authority of the Pickett Act and for the purpose of implementing the Taylor Grazing Act; and the Secretary then argues that the 1936 Amendment to Section 7 of the Taylor Grazing Act was necessary to provide for “classification” as a key to unlock the lands withdrawn by Executive Order No. 6910.

Therefore, throughout this brief it is assumed that the date of November 26, 1934, is the date at which the Secretary claims that all of the public domain located in the twelve States named in Executive Order No. 6910 became “locked up” and unavailable for school indemnity selection.

be approved in light of the Secretary’s unguided determination of the public interest.

The absurdity of the Secretary’s position is highlighted by the waffling he now must do to try to make the ends of his arguments meet. On the one hand, the Secretary seeks to ascribe to Congress a reasonable and rational intent to provide for management and disposition of the public domain; but, on the other hand, the Secretary finds it necessary—to support his irrational position—to claim that Congress blundered in 1934 when it enacted the Taylor Grazing Act, that President Roosevelt blundered in 1934 when he issued Executive Order No. 6910 and that—as a result of these blunders—Congress had to come to the rescue in 1936 by amending the Taylor Grazing Act in such a way as to give to the Secretary unbridled discretion in reviewing and approving or rejecting school land grants to the States.<sup>10</sup>

This shocking fiction is referred to at page 16 of the Secretary’s petition where, speaking with respect to Executive Order No. 6910, it is said that:

Indeed, the withdrawal was deemed so effective that, absent remedial legislation, the Secretary found no authority to release any part of the affected lands for State indemnity selection. See 59 Interior Dec. at 321.

The Interior Decision referred to offers this lame rationale:

<sup>10</sup> Section III.E. of this brief, *infra*, discusses in some detail many of the reasons why the Secretary’s argument is diametrically opposed to the very nature and purpose of the Taylor Grazing Act and the 1936 Amendment thereto.



Section 7 of the Taylor Act [before the 1936 Amendment] authorized the Secretary to classify such lands in grazing districts as might be more valuable for the production of agricultural crops than for native grasses and forage plants and to open them to homestead entry, but it made no provision for the classification and restoration of the withdrawn lands for any other purpose . . . . The whole public domain had been appropriated and reserved by the withdrawals and could be opened only for homestead entry . . . . This unprecedented situation could not be allowed to continue. By act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315f), the Congress amended section 7 of the Taylor Grazing Act to permit the classification of withdrawn lands suitable for uses other than homestead entry and their restoration to the public domain for disposal in accordance with such classification under the appropriate public-land laws . . . .

It is further to be noted that under section 7, as amended, no substantive rights whatever can be acquired by any applicant unless the Secretary shall give to the lands sought the classification requested. The section expressly provides that the withdrawn lands "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." This provision testifies conclusively to the congressional intent of 1936 that a suitable classification of land should thenceforth be the indispensable condition precedent to any disposal of any portion of the public domain in the continental United States. (59 I.D. 321-22 (1946)).

This Interior Department's administrative opinion is nothing short of preposterous. It cites not one word of legislative history to justify the outrageous conclusion

that the 1936 Amendment was intended by Congress to cure the blunder it allegedly had made by enactment of the 1934 Taylor Grazing Act and the blunder President Roosevelt allegedly made later in 1934 by issuing Executive Order No. 6910, resulting, it is said, in locking up the "whole public domain" so that no public lands could be disposed of for any purpose other than homestead entries. Rather than cite the clear legislative history which shows that the 1936 Amendment had no such purpose and accomplished no such result,<sup>11</sup> the Interior Department opinion prefers to seek strength from stout prose, declaring that the 1936 Amendment "testifies conclusively to the congressional intent" to require classification as a condition precedent to school indemnity selection.

The lower court would have none of this. Unable to swallow the Secretary's drama concerning the alleged reach and effect of Executive Order No. 6910, the lower court rejected it summarily:

Finally, we reach the Secretary's contention that classification is likely required under Executive Order 5327<sup>12</sup> issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders

<sup>11</sup> See Section III.E.1 of this brief, *infra*.

<sup>12</sup> See note 8, *supra*, where it is explained that in the court below the Secretary had relied on Executive Order 5237 in support of his position.

can be construed to apply to state school indemnity selections. (Secretary's petition, Appendix B, p. 51a).

### III. THE DECISION BY THE COURT BELOW IS CLEARLY CORRECT

#### A. Preface

It is difficult to respond to the petition of the Secretary without arguing the merits of the decision which the Secretary seeks to have this Court review. This is so because, as has been pointed out above, the entire thrust of the Secretary's argument is that the opinion below is simply wrong. A direct response to that argument is that the opinion below is clearly correct. Therefore, while Utah understands that a brief in opposition to a petition for certiorari should not be a full-fledged argument of the merits of the decision below—as if certiorari had already been granted—it seems both appropriate and necessary to present some argument in support of the lower court's decision. For one thing, the Secretary has argued in his petition virtually all of the points on the merits that he argued below. For another, if it appears clear to this Court that the lower court was correct, then there would be little point or purpose in granting a writ of certiorari.

The best defense of the lower court's opinion is the opinion itself. It is thorough and well reasoned. It effectively answers the arguments again raised by the Secretary in his present petition. It was decided by a unanimous court. When the Secretary filed a petition for rehearing in the court below with a suggestion that

the rehearing be *en banc*, not a single judge on the Tenth Circuit favored rehearing. Thus, despite the arguments that follow, Utah believes that a careful scrutiny of the lower court's opinion would be the most profitable utilization of this Court's time.

Since the Secretary attached the lower court's opinion to his petition as Appendix B, Utah perceives no point in appending it to this brief. When reference is made in this brief to particular parts of that opinion, the citation will be to the appropriate part of Appendix B of the Secretary's petition.

#### B. Public Trust Nature of School Land Grants

##### 1. Introduction

The Secretary views indemnity selections for school land grants in place as a congressional authorization for him to decide—based on his personal notions of public policy — when, whether and to what extent such selections should be approved. This is a mistaken view. Unlike most federal land grants, school land grants are made in trust to create a permanent fund for the support of the public school system of the State. This trust is extremely important and involves fundamental concepts of equal footing, sovereign governmental functions, and bilateral compact between sovereigns. Since the Secretary seeks to emasculate this public trust through his personal notions of public policy, it seems important to quote part of the lower court's summary of the nature of this trust:

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. *It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states.* The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.

Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. *State of Nebraska v. Platte Valley Power and Irr. Dist.*, 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands. The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of pre-existing rights of others. *McCreery v. Haskell*, 119 U.S. 327 (1886). (Petition, Appendix B, pp. 12a-14a; Emphasis in Opinion).

The summary quoted above is well founded in the law. A few aspects deserve special emphasis, as noted below.

## 2. *Equal Footing*

States admitted into the Union are accorded equal footing with the Original States, and the respective enabling acts so provide. The status of equal foot-



ing is not merely a matter of congressional grace, but is a fundamental constitutional requirement. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Utah*, 238 U.S. 64 (1931).

The requirements of "equal footing" extend beyond equality in sovereign power and regulatory authority, and include a measure of state-owned property rights (see *Smith v. Maryland*, 18 How. 71 (1855); and *United States v. Texas*, 339 U.S. 707 (1950)). Of course, this does not mean that each State must have an equal area or equal value in property, but merely that each State shall be accorded equivalent treatment under consistent and uniform principles.

In *United States v. Morrison*, 240 U.S. 192, 205 (1916), the court considered a school land grant to Nevada, and emphasized that all school land grants should be considered on an equal footing. To the same effect is *Heydenfelt v. Daney Gold & Silver Min. Co.*, 93 U.S. 634, 638 (1876).

As the lower court observed, with respect to revenues to support public schools, equal footing is achieved by a congressional grant designed to produce a fair and just settlement with the newly-admitted State in lieu of immunity from taxation of federal lands within the State, and by acceptance of the grant and the attendant trust restrictions by the State. It is this bilateral compact that "liquidates" the State's entitlement to public lands in lieu of taxing federal lands, and it is

thus the bilateral arrangement with the public land States that satisfies the requirements of constitutional equal footing.

### 3. *Bilateral Compact*

The Public Land Law Review Commission noted the bilateral nature of the federal school land grant program:

Commencing with Ohio, the traditional requirement has been that the new public land states must adopt an "irrevocable ordinance" preliminary to admission to the Union in which they recognize the property rights of the United States in the public lands, and that all Federal property shall be immune from state taxation. In addition, the states have agreed not to tax transferees of Federal lands for a stated period and to tax nonresident ownerships the same as those of residents.

In this sense, public land grants to states have not been strictly unilateral bounties, but rather important elements of bilateral compacts. (*One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. 244 (1970)).

The foregoing quotation is bottomed on sound judicial authority. In *Cooper v. Roberts*, 18 How. 173 (1855), the Supreme Court characterized a school land grant to Michigan as a "compact" between Michigan and the United States. And, in *United States v. Aikens*, 84 F.Supp. 260, 266 (1949), *aff'd. sub. nom.* 83 F.2d 192 (9th Cir. 1950), the court reviewed a considerable

number of cases, and concluded that railroad grants should be strictly construed, but that school land grants should be liberally construed because such grants:

... are grants from one sovereign, the United States, to another sovereign, the State, for public, and not private purposes of profit, and are not subject to such narrow construction.

#### 4. *Perpetuity and Solemnity of Trust*

The United States Supreme Court underscored the solemnity of the school trust obligation in 1967 when it decided *Lassen v. Arizona*, 385 U.S. 458 (1967). In that case the Land Commissioner of Arizona assumed that he could grant rights-of-way and material sites on school trust lands to the Arizona Highway Department without cash compensation to the school trust fund, if the highway would enhance the value of the adjoining school lands by a measure equaling or exceeding the value of the rights-of-way and material sites granted. The court held that the nature of the federal trust as created by the school land grants to the State prevented such action, and said that:

... Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands. (385 U.S. at 469).

The court further explained that:

The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal

Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly made clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms. We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands. (385 U.S. at 460-61).<sup>12a</sup>

The importance of this public trust has never been questioned by the courts. See *Alamo Land & Cattle Co., Inc., v. State of Arizona*, 47 L.Ed.2d 1 (1976).

#### 5. *Utah Enabling Act: Congressional Conditions for Creation of the Public Trust for Public Schools*

The Utah Enabling Act was passed by Congress as the Act of July 16, 1894, 28 Stat. 107, and was entitled:

An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States.

<sup>12a</sup> In *Lassen v. Arizona*, *supra*, this Court admonished the United States Attorney General "to maintain whatever proceedings may be necessary" to protect the integrity of the school trust grant to Arizona. Here, the Solicitor General asks this Court to cripple and diminish the school trust grant to Utah.

With respect to the immunity of federal lands from taxation by the State, Section 3 of the Enabling Act authorized a convention to be convened for the purpose of forming a constitution and state government, requiring that:

. . . said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State . . . that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use . . . .

Section 3 of the Enabling Act then proceeded to require the State of Utah, prior to statehood, to adopt an "ordinance irrevocable" for:

. . . the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Section 6 of the Enabling Act then provided:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress *other lands equivalent thereto . . . are hereby granted to said State for the support of common*

*schools*, such indemnity lands to be selected within said State in such manner, as the legislature may provide, with the approval of the Secretary of Interior . . . . (Emphasis added).

Section 10 of the Enabling Act then imposed the specific conditions on the use and disposition of the school land grant contained in Section 6:

. . . the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . . .

#### 6. *Utah Constitution: Acceptance of the Public Trust*

Utah accepted the conditions and obligations of the federal grant to create a trust in aid and support of the public schools by providing in Section 3, Article X, of the Utah Constitution that such school lands and all proceeds derived therefrom:

. . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only shall be expended for the support of the common schools.

Section 7, Article X, of the Utah Constitution further provided that:

All public school funds shall be guaranteed by the State against loss or diversion.

Thus, the public trust for the support of Utah's public school system was created by the grant and at-



tendant conditions established by Congress in the Utah Enabling Act and the acceptance by Utah through the adoption of its Constitution.

### 7. Summary

The lower court repeatedly emphasized the special and substantial features of the school land grant trust. For example:

The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. (Secretary's petition, Appendix B, p. 33a).

Further, the lower court deemed it important to emphasize and quote in full the trial court's Conclusion of Law No. 3:

*Conclusion No. 3:* Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which ac-

cepted the terms of the trust, as ratified and adopted by the people of the State of Utah. (Secretary's petition, Appendix B, p. 28a).

With the foregoing background, it becomes easier to appreciate the unique significance of school trust land grants, and the importance that this Court has placed on school indemnity selections.

### C. Supreme Court Clarification of School Indemnity Selection Rights

It will be recalled that, by virtue of Section 6 of the Utah Enabling Act, Congress not only granted to Utah four sections within each township for the support of the common schools, but further granted other lands "equivalent thereto" in lieu of any school lands originally granted to, but not received by, Utah. In addition to this specific indemnity grant to Utah, 43 U.S.C. 851 contains a basic indemnity grant and appropriation to all public land States entitled to school indemnity selections. So far as pertinent here, the relevant language provides that when original school grants in place do not pass to the States because of federal pre-emption or private entry prior to survey, then:

... other lands of *equal acreage* are hereby *appropriated and granted*, and may be selected in accordance with the provisions of section 852 of this title .... (43 U.S.C. 851; Emphasis added).

Section 43 U.S.C. 852(a) provides that:

The lands appropriated by section 851 of this title shall be selected from any unappropriated,

surveyed or unsurveyed public lands within the State . . . .

This Court reviewed the scope of discretion to be exercised by the Secretary of Interior when acting on indemnity selections in *Payne v. New Mexico*, 255 U.S. 367 (1921) and *Wyoming v. United States*, 255 U.S. 489 (1921). The lower court examined these decisions in some detail, as is shown from the following extracts from its opinion:

Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.

*Payne v. New Mexico*, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from cancelling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here). The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by

conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:

If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

255 U.S., at p. 370.

Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne*, *supra*, noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:

The words relied upon (subject to the approval of the Secretary of the Interior) are

not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

255 U.S., at p. 371.

State of Wyoming v. United States, *supra*, involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to "*waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state*." See: *California v. Deseret Water, Etc., Co.*, 243 U.S. 415 (1917); *Payne v. New Mexico*, *ante*, 367. Other laws of general application, §§441, 453, 2478, Rev. Stats. require that the selections be made under the direction of the Secretary of the Interior." (Emphasis supplied) 255 U.S., at 494.

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn Na-

tional Forest. The selected in lieu acreage "was vacant, unappropriated, and neither known nor believed to be mineral . . . ." "The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . ." 255 U.S., at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary executive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited surface right-certification or to show that the 80 acres was *still* not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title when the selection was made. Accordingly, Wyoming refused the tender. The commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, *and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove*



*and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, or still later was discovered to be mineral land, that is, to be valuable for oil. (Emphasis supplied.)*

255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful "in lieu" selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state*, but rather:

*... of determining whether an existing privilege conferred by Congress had been lawfully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then — if they met all the requirements of the congressional proposal, including the directions given by the Secretary — they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. (Emphasis supplied.)*

255 U.S., at pp. 496, 497.

The Court equated the "in lieu" selection to a

cash entry, citing to *Benson Mining Co. v. Alta Mining Co.*, 145 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in *Daniels v. Wagner*, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary's position. The Court held that when selections were made in accord with statutes it was the plain duty of the Secretary to approve them and *that the Secretary's power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in *State of Wyoming v. United States*, *supra*, directly applicable to the contention raised by the Secretary here that the "value for value" criteria is to be employed in approving the "in lieu" selection at issue is:

*... If these (selections of the "in lieu" lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership*

carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.

255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative *value* of tracts which are "mineral in character." The Supreme Court obliquely recognized this, *supra*, by reference to "whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected."

Thus, we conclude that the solemn bilateral agreement between the United States and the "Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted—or those selected "in lieu"—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for

Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in *State of Wyoming v. United States, supra*. (Secretary's petition, Appendix B, pp. 41a-48a; Emphasis in opinion).

The Secretary argues, however, that the Taylor Grazing Act has rendered the *Payne* and *Wyoming* cases inapplicable to the current conflict. It is time to examine that contention.

#### D. *Inapplicability of the Taylor Grazing Act of 1934*

The Taylor Grazing Act was enacted by Congress in 1934 as H.R. 6462, Public Law No. 482, of the 73rd Congress, Second Session, Act of June 28, 1934, 48 Stat. 1269, now codified as 43 U.S.C. 315 *et seq.* There is no conceivable way in which the Taylor Grazing Act of 1934 can be construed to confer upon the Secretary of the Interior authority to "classify" lands within a grazing district as a condition precedent to the selection of such lands by a State as indemnification for lost school lands.

There is nothing in the language of the act itself, or in its legislative history, that remotely suggests that it is to have any application to state school indemnity selections. The Taylor Grazing Act of 1934 was entitled:

AN ACT To stop injury to the public grazing lands by preventing overgrazing and soil deterior-

ation, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. (48 Stat. 1269).

A careful reading of the entire act reveals that it was in fact designed to control and regulate grazing on the public lands. Section 7 of the act—the provision which the Secretary cites as the source of his “classification” authority—provided in pertinent part that:

... the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry....

The above provision is entirely clear. The Secretary was authorized and required to classify lands located within grazing districts established under the act before such lands could be opened to entry for homesteading. In so doing, the Secretary was guided by a basic criterion — whether the land under examination had a higher and more beneficial use for the production of crops (homestead use) than for livestock grazing of native grasses and forage plants (the grazing use if the land was retained in federal ownership). The clear congressional instruction was that lands within grazing districts should be classified for homestead entry if their

potential for agricultural crops exceeded their value for grazing, and to deny such classification if grazing appeared to be the more valuable use.

But it is nothing short of ludicrous to suppose that this statutory language, by any stretch of the imagination, could be construed to authorize or require the Secretary to classify lands within a grazing district as a condition precedent to selection by a State in satisfaction of its school indemnity rights. The Secretary had no authority under the 1934 Act to classify lands for any use or purpose other than grazing or homesteading.

Thus, the 1934 Act is a horse quickly curried. It is the 1936 Amendment to that act which the Secretary construes as providing a procedure for “unlocking” lands withdrawn for classification under Executive Order No. 6910, and as the source of almost unlimited authority on his part to determine when federal lands shall be retained in federal ownership and when they shall be available for school indemnity selection.

#### E. *Inapplicability of the 1936 Amendment to the Taylor Grazing Act*

##### 1. *Legislative History of the 1936 Amendment*

Representative Taylor of Colorado was the sponsor of the original Taylor Grazing Act of 1934, and when his bill (H.R. 6462) was originally introduced in 1934 it purported to authorize 173,000,000 acres of pub-



lic domain to be included within grazing districts so that the public range lands could be regulated, managed and protected. The bill was amended, however, and the final enactment reduced the allowable acreage to a maximum of 80,000,000 acres (see Section 1 of 48 Stat. 1269).

Then, in 1936, Representative Taylor introduced H.R. 10094 in the 74th Congress, Second Session, to increase the allowable acreage within grazing districts by amending Section 1 of the 1934 Act, and this bill was enacted into law as the 1936 Amendment to the Taylor Grazing Act (49 Stat. 1976). But, before examining the specific language of the 1936 Amendment, Representative Taylor's explanations on the floor of the House as to the purpose of H.R. 10094 are illuminating:

I want to digress a moment to say that the original bill as I introduced it [referring to H.R. 6462, which became the 1934 Act] applied to all of the remaining vacant, unappropriated, and unreserved land of the public domain of the United States, at that time estimated at 173,000,000 acres, and the bill passed the House in that form. One of the hamstringing amendments added by the opponents of the bill during 3 months' debate in the Senate reduced the acreage to which the law could be applied to 80,000,000, leaving the remaining half of the public domain open to free exploitation, as it has been ever since.

Realizing the ruinous absurdity of this condition and the inevitable and rapid destruction of the remaining unprotected public land, the chairman of the Public Lands Committee of the House,

Mr. De Rouen, of Louisiana, at the opening of Congress in January 1935, introduced a bill making all public land subject to the provisions of this grazing-district law. The opponents of the law again loaded that bill with so many injurious amendments that the President was compelled to and did veto it.

Soon after the opening of this session of Congress I introduced another bill (H.R. 10094) merely amending the Taylor Grazing Act by increasing the amount of public lands, subject to its provisions, from 80,000,000 acres to 143,000,000 acres and making no other change in the law—just changing the figure 80 to 143. The bill passed the House unanimously March 16. It remained peacefully in the Public Lands Committee of the Senate from that time until last Monday, the 15th of June, when it was reported out with five riders amending other sections of the law and adding a new section.

While I somewhat doubt if any of these proposed new provisions should or could pass either the Senate or the House on their own merits in an independent bill, nevertheless I hope the bill will pass even in that form and become a law before this session of Congress adjourns. Otherwise the remaining public domain that is not already practically destroyed will very soon be utterly ruined by overgrazing and tramping out all the verdure on it. (Cong. Record, Vol. 80, Part 10, 74th Cong., Second Sess., House of Rep., June 19, 1936, at pp. 10281-82).

There is no further explanation in the proceedings in the House of Representatives to shed any light on the meaning intended by the amendments added by the Senate. Representative Taylor had earlier explained the

purpose of his bill (H.R. 10094) on the floor of the House on March 16, 1936:

*Mr. Taylor of Colorado.* Mr. Speaker, the object of this bill is to bring all the remaining public domain under the provisions of the Taylor Grazing Act that was enacted into law June 28, 1934 (48 Stat. 1269). The way the bill passed the House in the spring of 1934 it applied to all the remaining public domain in the United States. The bill was amended in the Senate limiting its application to only 80,000,000 acres of vacant, unappropriated, and unreserved lands of the public domain. This bill only changes one word in that law. It extends that limitation of 80,000,000 to 143,000,000 acres and will enable all the Western States to come in and put all of their remaining public lands under this law if they desire to do so.

*Mr. Greever.* I should like to ask the gentleman, Is the bill properly safeguarded so that the rights of the States to exchange their lands for lands of the United States are preserved?

*Mr. Taylor of Colorado.* This bill makes no change whatever in the existing law except in one word. It changes eighty to one hundred and forty-three. That is in the first section of the present law. (Cong. Record, Vol. 80, Part 4, 79th Cong., Second Sess., House of Rep., March 16, 1936, at page 3815).

The legislative history of H.R. 10094 in the Senate sheds relatively little light on the intended meaning of the 1936 Amendment. On June 15, 1936, Senate Report No. 2371 was ordered to be printed by the Committee on Public Lands and Surveys, 74th Cong., Sec-

ond Sess., and that report declares, with respect to Section 7, that:

It is proposed to amend section 7 of the Taylor Grazing Act so as to provide a more practical and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing.

The next to the last paragraph of that Report, as it appears on page 3, summarizes the intended effect of H.R. 10094 in the following language:

It should be understood that the raising of the limitation will not impair any of the other provisions of the law. Exchanges of State or privately owned land can be continued.

Just four days later, without any intervening discussion or debate, the bill was passed without objection or discussion. Senator Adams said:

Mr. President, I ask unanimous consent for the immediate consideration of House bill 10094. A few moments ago I endeavored to secure unanimous consent for its consideration, but the Senator from Oregon [Mr. McNary] then said he would not permit consideration of any legislation until the general unanimous-consent agreement had been carried out. He said there was no objection to the bill except that he did not want to interfere at that time with the program. *There will be no discussion about the bill.* It is important that it should go to the House and have an amendment concurred in there.

There was no objection and unanimous consent was given for consideration of the bill, and:

The amendment was agreed to. The amendment was ordered to be engrossed and the bill to be read a third time. The bill was read a third time, and passed. (Cong. Record, Vol. 80, Part 10, 79th Cong., Second Sess., Senate, June 20, 1936, at pp. 10479-80; Emphasis added).

There is no further legislative history, either in the House or the Senate, that offers any further illumination as to the meaning intended by Congress in the 1936 Amendment to Section 7 of the Taylor Grazing Act. Even though the legislative history of the 1936 Amendment is rather slim, it is absolutely clear that every word and every reasonable implication of that history makes clear that the amendment was intended to be confined to the basic purposes and scope of the original act of 1934 — and there is not the slightest justification for supposing that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the 1936 Amendment.<sup>13</sup> And

<sup>13</sup> And in 1966, when Congress amended 43 U.S.C. 852 to allow States to select unsurveyed lands, and also to select lands as indemnity for lands lost after survey but before creation of the State, the Senate Interior & Insular Affairs Committee underscored and reaffirmed the importance of discretion on the part of the State in making indemnity selections:

... there is no reason why a State should not be indemnified and receive the full grant of lands lost through no fault of its own regardless of when the loss took place. Nor is there reason to restrict selection of land from among those lands that have been surveyed. The survey of public lands is continuing; but many areas remain unsurveyed.

The present choice to be exercised by a State in seeking indemnity lands is limited because of the large acreage

it is also absolutely clear that the 1936 Amendment was in no way prompted by any need to provide a mechanism for "unlocking" lands withdrawn for classification under Executive Order No. 6910. In light of this legislative history, the Secretary should in good faith abandon his preposterous argument. It is now appropriate to examine the exact language of Section 7 as amended in 1936.

## 2. Text of the 1936 Amendment

It will be noted that Section 7 (now codified 43 U.S.C. 315(f)), recites that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

... proper for acquisition in satisfaction of any outstanding *lieu* ... rights or *land grant*, and to open such lands to ... *selection* ... for disposal in accordance with such classification under applicable public-land laws ... Such lands shall not be subject to disposition ... until after the same have been classified and opened to entry ... (Emphasis added).

### <sup>13</sup> Continued

**which remains unsurveyed.** This tends to militate against principles of good land management, particularly in terms of consolidating viable blocks suitable for development. (Senate Report No. 1213, 89th Cong., Second Sess., 1966; Emphasis added).

Thus, as the Senate Committee made clear, the basic limitation on the state's school indemnity selection discretion was the fact that much of the public domain was unsurveyed—and that restriction was removed. The reference to the obstacle that militated against "principles of good land management" was, of course, to the limited amount of federal land available for selection by the States, so as to prevent the acquisition of manageable blocks of land rather than isolated tracts—and was not a reference to any interference with federal land management resulting from State school indemnity selections.



It is the above language that is relied on by the Secretary as his source of authority for classifying land prior to the exercise by a State of its school indemnity selection rights, and that matter will now be examined.

### 3. *Reasons Why the 1936 Amendment is not Applicable to School Indemnity Selections*

There are a number of compelling reasons why the 1936 Amendment should not be construed so as to authorize or require the Secretary of Interior to classify lands within a grazing district as a condition precedent to their selection by a State in satisfaction of school indemnity rights. Some of these reasons are summarized below:

#### a. *Express Exemption for School Indemnity Selections*

The 1936 Amendment to the Taylor Grazing Act did not amend the exemptions contained in Section 1 of the 1934 Act, and those exemptions (now codified in 43 U.S.C. 315) include school land grants:

*Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. (Emphasis added).*

Thus, it is clear that nothing in the Taylor Grazing Act is to be construed as "affecting" the disposition of any land that would be a part of any grant to any State. It has already been shown that school indemnity lands are express "grants" to the States. Indeed, Section 6 of the Utah Enabling Act, 28 Stat. 107, provided that Utah's school indemnity lands "are hereby granted to said State for the support of the common schools", and 43 U.S.C. 851 provides that school indemnity lands "are hereby appropriated and granted".

It seems beyond dispute that school land grants are beyond the reach of the Taylor Grazing Act, and the only relevant question would seem to be whether there is some other provision in that act which expressly contradicts the exemption for "any grant to any State." As will be seen, there is no such contradiction.

#### b. *Classification Required Only for Private Entries*

As already noted, Section 7 of the 1936 Amendment contains the language relied on by the Secretary as his sole source of authority for classifying school indemnity selections to release them from the "locked up" status they allegedly acquired by being withdrawn for classification by Executive Order No. 6910. But that language of the act clearly seems to apply only to private rights and entries on the public domain. The relevant language in Section 7 provides that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

... proper for acquisition in satisfaction of any outstanding lieu ... rights or land grant, and to open such lands to ... selection ... for disposal in accordance with such classification under applicable public-land laws ... *Such lands* shall not be subject to disposition ... *until after the same have been classified and opened to entry* .... (Emphasis added).

It thus cannot be questioned that Congress intended the classification procedure to be a condition precedent to "entries" on the public lands; and it is difficult to see how "entries" can reasonably be construed to include land grants to the States, particularly in view of the express exemption in Section 1 of the act. A careful reading of the entire text of Section 7 suggests that Congress was concerned with *private* entries, since the primary focus was on homestead entries — even though the act, as amended in 1936, is broad enough to include any private "lieu, exchange or script rights or land grant."

The references to "lieu" rights, the process of "selection" of lands, and "land grants" under other statutes cannot reasonably apply to school indemnity selections. Many federal statutes have made *land grants* to private persons and entities, and have provided for *selection* of *lieu* lands by such private persons and entities. Illustrative examples would be the lieu selection rights of railroads under 43 U.S.C. 888, 890; 25 U.S.C. 334 (selection rights of Indians not residing on reservations); 43 U.S.C. 149 (private rights of selection when private lands are included within an extension of an Indian Reservation); and 43 U.S.C. 274 (selection rights of

veterans). Thus, it is clear that the pertinent language in Section 7 of the Taylor Grazing Act refers to land grants, lieu rights, and selection procedures as they pertain to *private* persons and entities, as distinguished from the rights of the States to make school indemnity selections.

This conclusion is reinforced by the fact that Section 7 made an express exemption for "locations and entries under the mining laws ... ." Mining locations are, of course, private entries, and they are the only *entries* exempted by Section 7. It must be remembered that Section 1 of the act exempted school land grants *from the entire reach of the act*, whereas Section 7, which deals only with classification, exempted mining locations *from the classification requirements of the act*. It is conceivable that if Congress had not exempted school land grants from the act under Section 1, there might have been some justification for providing such an exemption under Section 7 from the classification requirements. But, since Section 1 had already exempted school land grants from the act, and since Section 7 extended only to private "entries" on public lands, it would have been illogical to have made a further express exemption of school land grants under Section 7.

It would thus seem to be crystal clear that Section 7 requires classification only for *private* "entries" on the public domain, and that no disposition may be made of the public domain until the land has first been classified and "opened to entry." While no further support for this conclusion is needed, it does not seem to

be amiss to note that Congress expressly explained that Section 7 was to apply only to *private* entries:

It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available for *private entry* lands which are more valuable for other purposes than grazing. (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at page 2; Emphasis added).

It is of significance that the above quotation is from the legislative history of the 1936 Amendment, which the Secretary relies on exclusively as his source of authority for classifying school land grants under Section 7.

In brief summary, it may be said that:

(1) Section 1 of the Taylor Grazing Act expressly exempts school land grants from all parts of the act;

(2) Section 7 requires classification of all lands within a grazing district before such land will be open to *private* entry and disposition; and this construction is further compelled because:

(a) Section 7 expressly deals with various types of private entries and expressly exempts mining claims (private entries) from classification;

(b) Section 7 expressly prohibits disposition of lands within a grazing district until the same have been classified and opened to *entry*;

(c) Congress said, in amending the Taylor Grazing Act in 1936, that the classification requirement extended only to *private* entries; and,

(d) There is not *one word*, anywhere, in the Taylor Grazing Act or in its legislative history that is inconsistent with the clear congressional intention to exempt school land grants from that act and to require classification of public lands within grazing districts prior to *private* entry.

#### c. *Judicial Authority Exempts School Indemnity Selections*

There are no cases other than the decisions of the trial court and court of appeals in this case, which have ruled directly upon the question as to whether school indemnity selections are subject to classification under Section 7 of the Taylor Grazing Act, but several cases implicitly confirm that Section 7 requires classifications only for *private* entries and not for indemnity selections.

For example, *Carl v. Udall*, 309 F.2d 653 (D.C. Circ. 1962), seems to hold that classification under Section 7 is required for *private* selection of lieu lands to replace lands which conflicted with an early railroad grant. Similarly, *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970), held that the Secretary had broad discretion under Section 8 of the Taylor Grazing Act in deciding whether to approve *exchanges* of land. The important point, however, is that the Circuit Court observed that the Taylor Grazing Act had nothing to do



with school indemnity selections. It will be remembered that *Payne v. New Mexico*, 255 U.S. 367 (1921), sustained the validity of the state's school indemnity selection under 43 U.S.C. 851-52; and in *Lewis v. Hickel*, *supra*, the Court distinguished such school indemnity selections from exchanges under the Taylor Grazing Act:

*Payne v. New Mexico* involved the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. *However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with . . . .* Under the Taylor Grazing Act the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (427 F.2d at 676; Emphasis added).

While the above statement is only dictum, it is entirely clear that the Court viewed *Payne v. New Mexico* and the school indemnity statutes as "inapposite" to the Taylor Grazing Act because the indemnity statutes conferred absolute rights if the selections were filed in accordance with applicable statutory criteria, whereas the Taylor Grazing Act conferred broader discretion on the Secretary of Interior. This is extremely significant. *Lewis v. Hickel* was decided in 1970, some thirty-four years after the 1936 Amendment to the Taylor Grazing Act. Surely if the Circuit Court had thought that the Taylor Grazing Act had amended, changed or otherwise affected school indemnity selec-

tion rights, then it would have said that *Payne v. New Mexico* was inapposite *because the statutes therein construed had been changed* by the Taylor Grazing Act. But the Court did not say that — it said that *Payne* was inapposite to the Taylor Grazing Act because it was decided under entirely different statutes.

Other cases illustrate exactly the same point. Thus, in *Wilcoxson v. United States*, 313 F.2d 884 (D.C. Circ. 1963), the plaintiff cited *Wyoming v. United States*, *supra*, in support of his right to a patent under the Isolated Tracts Act. *Wyoming v. United States*, like *Payne v. New Mexico*, had construed the school indemnity selection statutes in favor of the State to compel the Secretary of Interior to approve the state's school indemnity selection. The Court distinguished the Secretary's ministerial duty under the selection statutes from his broader discretionary authority under the Isolated Tracts Act. Speaking with reference to *Wyoming v. United States*, the Court said:

We agree with the court below that such cases are inapposite since they arose under statutes different from the Isolated Tracts Act. *In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights to the lands.* Hence, the power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised. But in the Isolated Tracts Act Congress chose a wholly different method for disposing of interests in the public domain

. . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The distinction is between a positive mandate to the Secretary and permission to take certain action in his discretion. (313 F.2d at 888; Emphasis added).

The point of present emphasis is not the range or nature of the Secretary's discretion, but, rather, the fact that the Court distinguished the *Wyoming* case on the ground that it had been decided under separate statutes which conferred absolute rights of school indemnity selection on the States if the selections satisfied the statutory requirements. Again, the *Wilcoxson* case was decided in 1963, some twenty-seven years after the 1936 Amendment to Section 7 of the Taylor Grazing Act, and if the Court had thought that the latter statute had changed the nature of school indemnity selection rights, it would have distinguished the *Wyoming* case on that ground. But it didn't! The language of the opinion is very clear to the effect that the Court considered school indemnity selection rights to be the same in 1963 as in 1921 (when the *Wyoming* case was decided).

*Ferry v. Udall*, 336 F.2d 706 (9th Circ. 1964), also illustrates the same point. The issue was the same as in the *Wilcoxson* case, and, in distinguishing the *Wyoming* case, the Court said:

The Supreme Court held that the statutes constituted an offer to Wyoming, the compliance with which became mandatory once the State accepted the offer in accordance with the statutes. The discretion of the Department of Interior was

limited solely to determining whether the statutory conditions had been met. (336 F.2d at 713).

Once again, if the Court had thought that the *Wyoming* case was no longer good law as a result of any change or impact arising from the Taylor Grazing Act, it would have noted that fact. But it didn't! The Court clearly indicated that in 1964 it believed the *Wyoming* case still to be of full force and effect, but distinguished it on the ground that it construed the school indemnity statutes and not the statute then before the Circuit Court.

Thus, while there is no square holding (other than the decisions below) to the effect that the Taylor Grazing Act has no application to school indemnity selections, the cases clearly and uniformly suggest that the school indemnity rights of the States under 43 U.S.C. 851-52 have not been diminished or impaired, that the Secretary's range of discretion has not been enlarged, and that *Payne v. New Mexico* and *Wyoming v. United States* continue to be the controlling law with respect to the States' rights of selection and the Secretary's duty to approve the selections if they comply with the statutory criteria of 43 U.S.C. 852. And the court below expressly so held.

#### d. *Legislative History Confirms Exemption of School Indemnity Selections*

The legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act, as discussed in Section III.E.1 of this brief, *supra*, clearly demon-



strates beyond doubt that Congress did not intend to give the Secretary of Interior discretionary authority to deny school indemnity selections under the guise of classifying land within grazing districts.

To put it directly, it plainly and simply is unthinkable that Congress would have intended to limit or restrict school indemnity selection rights in any way through the enactment of the 1936 Amendment. That amendment was sponsored and supported by congressmen from the western public-land States — the very States that depended so heavily on school land grants and indemnity selection rights. How can any reasonable mind suppose that Congress intended to weaken, restrict or limit the school indemnity selection rights *without one word, anywhere*, in any part of the legislative history that even remotely suggests or hints that such selection rights would in any way be affected? To the contrary, Representative Taylor repeatedly emphasized that the 1936 Amendment was to do nothing more than enlarge the acreage encompassed by the act, that the rights of the States would not be disturbed or diminished, and that Section 7 as revised required classification only for private entries.<sup>14</sup>

<sup>14</sup> There are several additional elements of simple logic that suggest that school indemnity selections are exempt from classification under Section 7 of the Taylor Grazing Act. While these matters need not be developed in the text of this brief, it does seem appropriate to summarize them in this note.

First, the purpose and thrust of the classification process authorized by Section 7 of the 1936 Amendment is to determine whether lands within a grazing district are adaptable to "uses" which have a higher value than grazing. The Secretary is authorized:

... to examine and classify any lands ... within a grazing district, which are more valuable or suitable for

e. *Exchanges Exempt under Section 8(c)*

Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), also amended by the 1936 Amendment, authorizes *exchanges* of state-owned lands for federal lands located within a grazing district. These exchanges are exempt from classification under Section 7. It would be ridiculous to suppose that Congress would

<sup>14</sup> Continued

the production of crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act. . . . (Emphasis added).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title; and, after acquiring title, the State may put the land to whatever use it sees fit, so long as the terms and purposes of the school trust are observed. Thus, school indemnity selections involve no "uses" for the Secretary to evaluate to determine whether such uses are more valuable than the grazing use, and for this reason the "classification" procedures of Section 7 could not apply to such school indemnity selections.

A second observation is that Section 7 of the 1936 Amendment provides that lands within a grazing district shall not be disposed of until they are classified and opened to entry. School indemnity selections are not "entries" in the traditional sense, and have never been considered to be. It is thus illogical to assume that the classification procedures of Section 7 were intended to be a condition precedent to filing school indemnity selections.

A third practical reason why the 1936 Amendment does not apply to school indemnity selections is that the Amendment only applies to "unappropriated" federal lands, and school indemnity selection lands had previously been "appropriated" for school trust purposes. Thus, 43 U.S.C. 851 clearly provides that when original school grants in place do not pass to the State because of federal pre-emption or private entry prior to survey, then:

... other lands of equal acreage are hereby **appropriated and granted**, and may be selected in accordance with the provisions of section 852 of this title . . . . (43 U.S.C. 851; Emphasis added).

Section 1 of the Taylor Grazing Act, as it presently appears in 43 U.S.C. 315, provides that:

... the Secretary of Interior is authorized, in his discretion, by order to establish grazing districts or addi-



exempt such land "trades" from classification, but would, at the same time, relegate school indemnity selections to a lower status than land trades, thus requiring school indemnity selections to be subject to classification.

The final paragraph of Section 8(c) provides:

For the purpose of effecting exchanges based on

<sup>14</sup> Continued

tions thereto and/or to modify the boundaries thereof, of vacant, **unappropriated**, and unreserved lands from any part of the public domain of the United States . . . . (Emphasis added).

Since the Secretary's administrative jurisdiction over federal lands in grazing districts is limited and confined to "unappropriated" public lands, and since Congress specifically "appropriated" all lands necessary to satisfy school indemnity selection rights prior to enactment of the Taylor Grazing Act, it necessarily follows that the Secretary has no authority to "classify" **appropriated** lands to determine whether they are suitable for school indemnity selection. The Taylor Grazing Act simply does not apply to any school indemnity lands, even though they may be located within a grazing district.

A fourth point of logic is that even if it should be assumed, *arguendo*, that the language of Section 7 of the 1936 Amendment could be tortured and strained so as to apply to school indemnity selections, it seems clear that any withdrawals or classifications under that statute would be subject and subordinate to the prior "appropriation" of lands for school indemnity selection by virtue of 28 Stat. 107 (Utah Enabling Act) and 43 U.S.C. 851-52.

A fifth practical observation is that even if Section 7 of the 1936 Amendment to the Taylor Grazing Act could be construed as "withdrawing" or "reserving" public lands so as to require classification of school indemnity lands prior to disposition, it is clear that such lands were not "appropriated" by said Section 7. Since the States have a direct statutory right to select any "unappropriated" lands from the public domain, it is quite obvious that such school indemnity selections may be made without regard to the classification procedures (or any other provisions of) the Taylor Grazing Act. Specifically, 43 U.S.C. 852(a) provides that:

The lands appropriated by section 851 of this title, shall be selected from any **unappropriated**, surveyed or unsurveyed **public lands within the State** where such losses or deficiencies occur . . . . (Emphasis added).

lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The *selection* by the State of lands in *lieu* of any such protracted school sections shall be a waiver of all of its right to such sections. (Emphasis added).

The lieu selections mentioned in the above statute must be distinguished from school indemnity selections. The exchanges authorized by Section 8(c), so far as school lands are concerned, are the *original school grants in place*, where the State has received title, or is authorized to receive title at the date of survey. In short, these are school sections that *have not been denied to the State* by federal pre-emption or private entry prior to survey. They are not indemnity lands.

School indemnity selections, on the other hand, are of an entirely different character. A State is entitled to indemnity lands *only when* original school grants in place are denied to the State by virtue of federal pre-emption or private entry prior to survey. For that reason, the grant and appropriation in 43 U.S.C. 851, and the restrictions and limitations on the exercise of the grant as set forth in 43 U.S.C. 852, relate and apply only to school *indemnity* selections in lieu of lost school lands. And, by contrast, the exchanges of school lands in place (the original school grants) as authorized by Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), are governed and controlled by said Section 8(c).

The Secretary's applicable regulations for exchanges under Section 8(c) are found in 43 C.F.R.

2210. In particular, Regulation 2211.0-3(b) (2) provides that:

State exchanges are not subject to the classification requirements of Group 2400 of this chapter.

In view of the fact that school indemnity lands have been granted to the States by Congress to create a solemn public trust, and in view of the language of the Taylor Grazing Act and its legislative history, it is absurd to think that school indemnity selections are subject to the classification requirements of Section 7 of the Taylor Grazing Act while land trades and exchanges under Section 8(c) are exempt. The Secretary would be hard put to advance a rational reason for such an absurd result.

By way of comparison, it might be noted that exchanges of private lands for federal lands are authorized under Section 8(b) of the 1936 Amendment, 43 U.S.C. 315g(b). With respect to these exchanges, the Secretary has rather broad discretionary authority, and must determine whether the "public interests" will be advanced by any such exchange. Private exchanges are subject to classification under 43 C.F.R. 2400.0-3(b) and 43 C.F.R. 2200. This seems to be consistent with *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970). It is also fully consistent with the arguments advanced by Utah in this brief, particularly with respect to the observation that Section 7 of the Taylor Grazing Act applies only to *private* entries, exchanges and selections.

This is to say that private exchanges under Sec-

tion 8(b) are subject to classification under Section 7, but state exchanges under Section 8(c) are not. Again, the Secretary would be hard put to advance a rational basis for his argument that school indemnity selection rights should be equated with private land exchanges by subjecting both to Section 7 classification procedures.<sup>15</sup>

#### f. *Exchanges under Section 8(c) Mandatory*

The exchanges under Section 8(c) of the 1936 Amendment to the Taylor Grazing Act, as discussed above, are *mandatory*, and the Secretary is obligated to approve land exchanges proposed by the States. That provision declares that whenever any State files an application to exchange state-owned land for federal land, that:

<sup>15</sup> The Secretary has not explained how lands "exchanged" under Section 8(c) escaped from the alleged confinement of the withdrawal for classification under Executive Order No. 6910. Presumably it is the language of Section 8(c) itself that the Secretary would construe as serving to "unlock" lands from Executive Order No. 6910 and exempting such lands from "classification" under Section 7.

But this merely illustrates, once again, how the Secretary's irrational administrative interpretations would stand the Taylor Grazing Act on its head. On the one hand there are the simple land trades, where prior to 1936 the States had no rights of exchange but merely requested the Government to approve such exchanges as proposed by the States. With respect to these trades, the Secretary now argues (or at least seems to concede) that Section 8(c) of the Taylor Grazing Act did marvelous things for the States: (1) It "unlocked" lands proposed for exchange from Executive Order No. 6910; (2) it exempted such exchanges from the "classification" requirements of Section 7; (3) It virtually mandated the Secretary to approve trades proposed by the States, giving the Secretary practically no discretion to reject such proposals; and (4) it mandated the Secretary to cooperate with the State so as to effectuate the exchange at the "earliest practicable date."



... the Secretary of Interior *shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end . . . .* (Emphasis added).

Section 8 of the 1934 Act had merely provided, in substance, that exchanges of state-owned land would proceed in "the same manner" as exchanges of privately owned land. The Senate Report on H.R. 10094, which was enacted into law as the 1936 Amendment, observed that the purpose of amending Section 8 was "to make mandatory the exchange of lands upon the application of a State owning lands within a grazing district, and otherwise to perfect the section." (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at p. 2).

<sup>15</sup> Continued

But, with respect to the solemn bilateral compacts that resulted in the school trust grants, the Secretary claims that Congress acted in a cavalier and reckless manner. Under Section 7 of the Taylor Grazing Act, the Secretary says, Congress: (1) Left lands selected by States for school indemnity locked firmly within the grasp of Executive Order No. 6910, to be released only upon a favorable "classification" by the Secretary; (2) refrained from establishing any guidelines, criteria or policy of whatsoever nature for such "classification", but left to the Secretary unbridled discretion to reject indemnity selections at will, and to consider anything at all that he deemed relevant to determine whether the selected lands were "suitable" for selection; (3) refrained from directing the Secretary even to take any action at all on school indemnity selections, so that, as is the case here, the Secretary could wait for fourteen years without acting on the selections.

Of course, Congress never intended any such topsy-turvy construction of the statute. It is simply the subsequent irrational interpretation of the Department of Interior that would result in such a grotesque construction of the statute. These irrational contentions would perhaps be humorous if viewed from an abstract vantage point. But when Utah's school indemnity land grant would be fatally crippled by such administrative action, it is not funny at all.

It would seem highly anomalous if Congress intended to *require* the Secretary to approve *exchanges* proposed by States but to confer upon the Secretary discretion either to approve or reject the States' rights of school *indemnity selection*. Yet, Section 8 clearly directs and requires the Secretary to approve such exchanges, and the Secretary now argues that Section 7 should be construed so as to authorize him to deny school *indemnity selections* by classifying the selected land for retention in federal ownership. The result of such an argument would be that even though the Secretary would be bound to approve exchanges proposed by States, he would not be bound to approve indemnity selections to satisfy school land grant entitlements.

It is also incredible to believe that Congress would authorize the Secretary to refrain from taking any action whatsoever on school indemnity selections for nearly fourteen years, as is the case in the matter now before the Court, but would, at the same time, direct the Secretary to proceed with state exchanges "at the earliest practicable date."

As noted repeatedly above, school indemnity selections are made as a matter of right to fulfill the purpose of a solemn public trust, whereas exchanges are simply land trades which occupy a much lower status of importance and priority.

g. *Classification of Original Grants in Place*

The Secretary has placed himself in a most difficult dilemma by contending that school indemnity



selections must be classified under Section 7 of the Taylor Grazing Act in order to release them from the withdrawal for classification as implemented by Executive Order No. 6910 in 1934. If the Secretary's argument is to be accepted, it would mean that the States would not even receive title to original school grant sections in place surveyed after 1934 until the Secretary "classified" the school sections to "unlock" them and to determine whether they were suitable for disposition. This is truly a ridiculous notion.

States receive title to original school land grants in place when the lands are surveyed, and not all of the public lands have been surveyed. The Secretary claims that he must first classify as suitable for disposition all federal lands within grazing districts before such lands can be unlocked, transferred or conveyed, other than exchanges under Section 8(c). *All federal lands in Utah are located within grazing districts.* Therefore, even when sections 2, 16, 32 and 36 (the school sections) are surveyed in any particular township, under the Secretary's view he would have to proceed to "classify" these lands, first to "unlock" them from Executive Order No. 6910, and then to use broad discretion to determine whether, in his personal judgment, such school sections were suitable for disposition in aid of the common schools of the State. This is so absurd that, even though it is the Secretary's argument before this Court, it is not — and never has been — his administrative practice. School sections in place and surveyed after 1934 consistently have been patented to Utah without any sort of "classification."

But if the Secretary now were to concede that school sections in place are not within the scope of the 1936 Amendment, then he must explain some rational basis for distinguishing between the school grants in place and the indemnity selections in lieu of grants in place. And he has not been able to articulate a rational distinction. The public school trust is comprised of original grants in place *and* an equal acreage of other lands in lieu of any grants in place that are denied to the States because of federal pre-emption or private entry prior to survey. No one denies that original grants in place and indemnity selections in lieu of lost original grants are part and parcel of the same integrated school trust.

h. *Taylor Grazing Act should be Construed so as to Avoid Doubt as to its Constitutionality*

Courts favor that construction of a statute which does not raise doubts as to its constitutionality. The power which the Secretary seeks in order to classify school indemnity selections under Section 7 of the Taylor Grazing Act would be an absolute power to deny the vested indemnity selection rights of the States. This is so because the Secretary contends that he is empowered to classify any lands within a grazing district for retention in federal ownership and against school indemnity selection, and that such a classification would not be subject to judicial review because it is within his absolute discretion. Needless to say, if the Secretary is accorded such a scope of discretion, as he now desires under the guise of "classification", then the selection rights of the States would amount to very little.

The sophism advanced by the Secretary in support of his position is that the rights of the States will not be abridged or diminished at all, because they still will have their selection rights even though the Secretary denies particular selection lists by classifying the selected land for retention in federal ownership. Thus, goes the argument of the Secretary, the States can simply file new school indemnity selections, and if these new selections are also denied by the Secretary, why, then, the States can just keep on filing and filing their indemnity selections. Even though the States might never get any indemnity lands, they will always have their selection "rights".

The deceit in that argument is similar to the Secretary's references to the "selection pool" of lands from which the States may make their selections. (Secretary's petition, p. 14, and Note 13, pp. 14-15). In connection with the "selection pool" references, the deceit is that the Secretary actually argues that every acre in twelve States, including Utah, has been withdrawn and "locked up" since 1934 by virtue of Executive Order No. 6910. And so there is actually no "selection pool" at all, according to the Secretary, and there has been none for at least forty-five years. Here, the deceit by the Secretary is somewhat similar. Every acre of land in Utah is included within a grazing district (see Federal Register, Vol. 40, No. 148, Thursday, July 31, 1976, at page 32147). This means that it would be absolutely impossible for Utah to file any school indemnity selection, anywhere, without being subject to the Secretary's alleged "classification" authority. The

Secretary asserts that his scope of discretion in "classifying" selected lands is very broad, that he may consider a wide range of public interest factors in deciding upon the appropriate classification, and that if he classifies the land for retention in federal ownership it remains locked within the grasp of Executive Order No. 6910, and that such administrative action is not reviewable in the courts because there is no "law to apply" to test the legality of his decision.

Thus, under the Secretary's view of his "classification" authority under the Taylor Grazing Act, he could reject every school indemnity selection list filed by Utah during the next 100 years; the courts could never review such rejections because they would be within the lawful range of the Secretary's discretion; and Utah's public school system would be denied the trust lands "granted" by Congress upon Utah's admission to the Union.

A further practical evil that could result from the Secretary's desired scope of "classification" power and discretion is that the Secretary could "classify" for retention in federal ownership all lands in Utah, except an acreage of barren, worthless, waste lands equal to the number of acres which Utah is entitled to select as school indemnity lands. And, the Secretary says, such an action would not be reviewable because he has lawful discretion to so classify; and he also says that Utah's selection rights would not be impaired or diminished because Utah would be entitled to receive substitute acreage equal to its indemnity rights.



Utah's original school grant included sections 2, 16, 32 and 36 in each township, and would have included a balance of forest lands, prime agriculture lands, mineral lands, as well as desert and barren lands. To provide a fair balance and value in indemnity selections, Congress provided in 1958 that States could select mineral lands *if* their lost base lands were mineral in character (72 Stat. 928, 43 U.S.C. 852). But the Secretary says he has authority to cancel that statutory provision through his administrative "classification."

The public school trust was created through the bilateral actions of Utah and the United States, resulting from the congressional enactment of the Utah Enabling Act and the State's response in adopting appropriate provisions in the Utah Constitution. That bilateral compact, accompanied with the federal grant, created valuable, vested rights in the State of Utah to select school indemnity lands. The construction which the Secretary seeks of Section 7 of the Taylor Grazing Act undeniably would result in a serious and substantial impairment and diminution of the value of Utah's vested selection rights, and there certainly would be a serious question as to the constitutionality of Section 7 if it should be construed in the manner requested by the Secretary.

In *Wyoming v. United States*, 255 U.S. 489 (1921), the Court said that when a State files school indemnity selections in accordance with applicable statutory criteria, such filings:

... confer *vested rights which all must respect*. (255 U.S. at 496; Emphasis added).

Further, the Court rejected the Secretary's argument that he had authority to withdraw the land from selection under the provisions of a 1910 statute, holding that such a withdrawal would be a violation of the rights of the State:

... by the selection this land had ceased to be public, and ... the act could not be construed to embrace it without working an *inadmissible interference with vested rights*. (255 U.S. at 508-09; Emphasis added).

The Court was speaking with specific reference to rights which had vested in the State upon the filing of the school indemnity selection lists, and not with respect to school indemnity selection rights where no selection lists had been filed. It is equally clear, however, that the right of selection in satisfaction of the school indemnity grant is a vested right that may be exercised in the discretion of the State. Since all lands within Utah are within grazing districts, and since the Secretary contends that he is authorized to classify all such lands, and in his absolute discretion to deny any selection lists filed, the net result would be that Utah would have no selection rights whatsoever, but would simply have to request the Secretary, in his discretion, to allow some school indemnity selections for some lands, somewhere, within the State of Utah. It is this result that would cast a serious cloud over the constitutional validity of Section 7 of the Taylor Grazing Act if the Secretary's argument is adopted.



If two alternative constructions of a statute are plausible, and one construction would render the statute unconstitutional while the other would sustain the statute as valid, then the courts will adopt the construction that will sustain the validity of the statute (*Power Brake Equip. Co. v. U.S.*, 421 F.2d 163 (9th Cir. 1970); *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971)).

Further, if the court can find a reasonable construction of a statute that will avoid reaching a question as to its constitutionality, then that course of action will be followed (*United States v. Hayman*, 342 U.S. 205 (1952); *Barr v. Matteo*, 355 U.S. 171 (1958)).

To construe Section 7 of the Taylor Grazing Act in such a manner as to authorize or require the Secretary to classify land for disposition in response to school indemnity selections is to create a serious question as to the constitutionality of the statute; whereas if the statute is construed so as to exempt and exclude school indemnity selections from the scope of the act, the constitutional difficulty is avoided. Moreover, the latter alternative is the *only* plausible construction of the statute.

i. *Mineral Rights not Affected by Taylor Grazing Act*

It is absolutely clear that nothing in the Taylor Grazing Act authorizes the Secretary to classify or dispose of the *mineral estate* in federal lands. That act applies to the surface estate only. Since 1897 the mineral resources of the United States have been subject to exclusive examination and "classification" by the

United States Geological Survey (43 U.S.C. 31(a)).

It is absolutely clear that States are entitled to make school indemnity selections of mineral lands under 43 U.S.C. 852 if the base lands are mineral in character. It necessarily follows that the Secretary could not possess authority to "classify" school indemnity selections for disposition of the mineral estate under Section 7 of the Taylor Grazing Act. The lower court emphasized this observation at page 36a, Appendix B, of the Secretary's petition.

j. *School Indemnity Statutes Liberally Construed*

The lower court construed the school indemnity statutes in such a manner as to give meaning and effect to the congressional policies and purposes as set forth therein. The Secretary now urges this Court to reverse the lower court by construing the Taylor Grazing Act in an unreasonable and irrational fashion that would frustrate and emasculate the indemnity grants which Congress made to the States.

While federal land grant statutes often are construed strictly in favor of the United States and against claimants to federal lands, that rule does not hold true with respect to school land grants. Speaking of the very indemnity provisions that are now under review, this Court said, in denying the Secretary discretion to reject a state's indemnity selection, that:

... it is of further significance that this court had recognized that the legislation of Congress designed to aid the common schools of the States

is to be construed liberally rather than restrictively. *Beecher v. Wetherby*, 95 U.S. 517, 526; *Johanson v. Washington*, 190 U.S. 179, 183. (*Wyoming v. United States*, 255 U.S. 489, 508 (1921); see also 42 Op. Atty. Gen., February 7, 1963).

#### k. Summary

At various places in its opinion the court below discussed and adopted virtually all of the arguments set forth above. Perhaps the most succinct portion of the opinion in this regard is where the court quotes with approval Conclusion of Law No. 6 of the trial court:

*Conclusion No. 6:* The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), *cannot reasonably be construed to require classification* of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act. (Secretary's petition, Appendix B, pp. 29a-30a; Emphasis added)

#### F. Equal Acreage rather than Equal Value

The Secretary's sole argument in support of applying a "comparative value" criterion to school indemnity selections is Section 7 of the Taylor Grazing Act. Absent that vehicle, the Secretary has advanced no theory as to how he might escape the clear mandate

of the school indemnity selection statute (43 U.S.C. 852), which requires that selections be of equal acreage to the base lands.

As illustrated above, the lower court emphatically rejected the Secretary's attempt to invoke any "classification" authority under Section 7 of the Taylor Grazing Act to defeat school indemnity selections—and based such rejection on numerous and sound grounds. As a result, the "comparative value" argument of the Secretary is moot. For illustrative references to portions of the lower court's opinion where that argument was roundly criticized, see Secretary's petition, Appendix B, pp. 8a, 9a, 12a, 13a, 14a, 20a, 21a, 22a, 23a, and 24a.

However, it should be noted that the origin and nature of the "comparative value" criterion are examined in some detail in Section II.B. of this brief, *supra*, dealing with the Secretary's claim that Congress has acquiesced in the policy (Udall memorandum) he now desires to implement.

#### G. Classification under Section 7 would not Authorize a "Comparative Value" Criterion

The preceding section of this brief has shown that there is no basis or justification for subjecting school indemnity selections to the "classification" requirements of Section 7 of the Taylor Grazing Act, and that the lower court's conclusion to that effect was absolutely inescapable.

The trial court held that, even if it were to be as-

sumed, *arguendo*, that the Secretary had authority to classify school indemnity selections under Section 7 of the Taylor Grazing Act, he could not apply a "comparative value" criterion because the only available law to apply to such a classification was contained in 43 U.S.C. 852, which requires such selections to be based on equal acreage. The lower court approved that holding but did not find it necessary to discuss in detail that hypothetical because it saw no reasonable possibility whereby school indemnity selections could fall within the classification requirements of Section 7.

Nevertheless, the lower court did quote, with clear approbation (Secretary's petition, Appendix B, pp. 27a, 28a, 30a, 31a, 48a and 49a), the trial court's Finding of Fact No. 12 and Conclusion of Law No. 7, which are self-explanatory, and which constitute an effective alternative rejection of the Secretary's "comparative value" criterion even if he could "classify" school indemnity selections under Section 7. Conclusion of Law No. 7 is rather inclusive, yet succinct:

*Conclusion No. 7:* Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of

Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Con-



clusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act. (Secretary's petition, Appendix B, pp. 30a-31a).

### CONCLUSION

It is respectfully submitted that the Secretary's petition for a writ of certiorari should be denied.<sup>16</sup>

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May 18, 1979

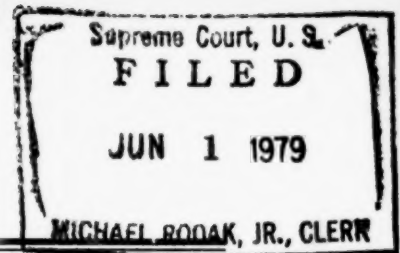
<sup>16</sup> In the lower court, the State of Idaho and the Justheim Petroleum Company appeared, separately, as *amici curiae* and presented arguments in support of the position of the State of Utah.

### CERTIFICATE OF SERVICE

I, Robert B. Hansen, Attorney General, of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that two copies of the foregoing Brief by the State of Utah in Opposition to Petition for Writ of Certiorari were served upon each of the following: Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; David H. Leroy, Attorney General of the State of Idaho, State House, Boise, Idaho 83720; and Frank J. Allen, Attorney at Law, Clyde & Pratt, 351 South State Street, Salt Lake City, Utah 84111, by mailing the same, postage prepaid, this 18th day of May, 1979, all in accordance with the Rules of this Court.

ROBERT B. HANSEN  
Utah Attorney General

No. 78-1522



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

---

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
PETITIONER

*v.*

STATE OF UTAH

---

**BRIEF OF JUSTHEIM PETROLEUM COMPANY, AS  
AMICUS CURIAE, IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

---

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**INTRODUCTION**

This brief is submitted as supplemental to and supportive of the State of Utah's brief. The Amicus feels competent to add to the Court's understanding of the issues for reasons which the Tenth Circuit Court of Appeals found adequate and persuasive.

**ARGUMENT**

In the "questions presented" section of his Petition for Certiorari, the Secretary has (1) isolated the Taylor

(1)

Grazing Act (the "Act") as the sole source of his purported authority to control state selections and (2) confessed that, to sustain his position, this Court must interpret the Act as a withdrawal of all federal public domain in Utah, so far as eligibility for state selection is concerned, subject to the Secretary's discretion to restore or refuse to restore it as selection applications are received based on his judgment whether the lands sought to be selected are more valuable than the base lands.

The Secretary contends, therefore, that the Act, despite the facial innocence of its language, was a congressional device surreptitiously but dramatically to reduce the federal obligation under the relevant enabling acts from an objective and enforceable duty to a matter of Secretarial grace. In support of that contention, the Secretary has, throughout the course of this litigation, relied on inter-office memoranda and departmental correspondence generated decades after the Act's passage as if those documents could legitimately be considered a part of the Act's legislative history or provide valid insights to legislative intent at the times (1934 and 1936) when the Act was under congressional consideration.

In its Decision here sought to be reviewed, the Circuit Court of Appeals has shown how thoroughly out of harmony with the spirit of the enabling acts the Secretary's urged construction of the Act would be and how unsophisticated a reading of congressional output is required to find support for that construction.

One objective of this Amicus brief is to emphasize to this Court that the Secretary, in his responses to state selection applications over decades following the Act's passage, gave no indication that he interpreted the Act to require an "eligible for selection as equal in value" classifi-

cation of the lands identified for selection as a prerequisite to approval. The Secretary's classification authority under the Act is to be exercised "pending" and to expedite statutorily authorized "disposition," and that authority has consistently been construed, even where sale, exchange, or other disposition to individuals is concerned, to be limited. The Secretary can classify only to advance range management — or at least surface management — objectives. *Bleamaster v. Morton* (1971 CA 9 Cal) 448 F2d 1289; *Daniels v. U.S.* (DC-Okla) 247 F.Supp. 193. The authority was conferred under the terms of legislation clearly and solely designed to reforest and protect the public range. The Act was *not* intended to correct inequities and deficiencies in the legislative machinery for indemnifying the states; the 1958 amendments to 43 USC 851 and 852 *were* so intended.

The Secretary correctly asserts that it has been undeviating departmental practice to classify lands sought to be selected by states as a prerequisite to approval of any selection application. But it is also true that, until the applications here in issue were submitted, the Secretary classified purely on the basis of enabling act criteria and apparently regarded such classification as a ministerial and routinely to be performed duty of his office.

The public land states have completed indemnity selections by hundreds of applications filed both before and after the 1958 and 1960 amendments to 43 USC 851 and 852. In no case did the Secretary call for value data or base his classification on any criteria except (1) the "open public domain" status of the lands sought to be selected and (2) the status of the base lands as lost to the selecting state by federal appropriation before the event (statehood or survey) which would otherwise have vested state title.



There is no documented history of any inter-sovereign negotiation about comparative values. In every case, the acreage of the lands approved for selection has been exactly the acreage of the lost lands identified as base in the selection list.<sup>1</sup> It is hardly possible that the values of selected and base lands were always even roughly equal. The United States had withdrawn the most valuable public lands (for forests, power sites, etc.) or they had been the subject of homestead or other entry before the states ever had opportunity to exercise selection rights. Until the 1958 and 1960 amendments to 43 USC 851, and 852, the proposition that lieu selections could actually indemnify the states was patently false.

The congressional output on which the Secretary relies as reflecting a legislative endorsement of his present position (so as to justify application of the doctrine that legislative acquiescence in long-standing administrative practice is an index to original legislative intent) is, at best, suspect. The 1960 committee report to which he refers at page 19 of his Petition issued years before his "value for value" policy was formulated and could only have constituted endorsement of the enabling act authorized "acre for acre" classification practice being followed in 1960. Similarly, the comments of individual congressmen in the course of 1976 committee hearings (as quoted at page 23 of the Secretary's Petition) are not properly to be viewed as reflective of any pervasive legislative attitude. The views of those congressmen were never incorporated in any committee report or identified legislation.

<sup>1</sup>The record on appeal does not include evidence on this subject. Record deficiencies have not, however, deterred the Secretary. He has undertaken to inform this Court by footnoted statements and statistics (at variance with our information) whose source is not revealed.

The efforts to construct a foundation for use of "value for value" criteria in classifications for state selection purposes have been purely departmental efforts conducted in house and without notice to the states. It is not difficult for the Department of the Interior to influence the statements of House and Senate Interior Committee members. The close liason between the staffs of executive departments and legislative committees is generally wholesome, but it does permit the departments to create an illusion that Congress is thoroughly aware and approbative of administrative positions which have not had any real exposure to the public or even to the Congress. The use of value criteria can hardly be called an established and highly publicized administrative practice; the Secretary's *first* attempt to apply such standards precipitated this lawsuit.

Secondly, the Amicus would suggest to the Court that, despite the secretary's protestations that evil or devious motives cannot be ascribed to his office, the recognition of a departmental "discretion" in the selection process is tantamount to denial of selection rights. The record on appeal shows that the first of the selection lists under scrutiny was filed in 1965. The Secretary has presumably reacted to that stimulus in the continuing conviction that value for value criteria had somehow become controlling in lieu selection transactions. Nevertheless, the Secretary has not, in the ensuing fourteen years (or even since the first secret departmental expression of the idea in 1967), undertaken to generate any regulations for evaluation or any forms by which evaluation factors could be presented.<sup>2</sup> The persons holding the office have simply shown monolithic indifference to the State's desires and objectives.

<sup>2</sup>The appellate court decision sought to be reviewed makes note of the Secretary's failure to act in this regard.



The Secretary is prepared to "assume that he would be abusing his discretion if he failed to classify as available sufficient lands to satisfy outstanding state indemnity selections."<sup>3</sup> Nevertheless, the Secretary has not so classified *any* land. His practice is to defer any classification for selection availability (even though his authority under the Act is not so limited) until a selection application is received, and then to classify only the land sought to be selected.

The process by which the Secretary proposes to classify is one which entails interminable delays. If his policy is judicially approved, he will deny the pending applications because values are disparate. That decision will nevertheless be delayed for some significant time (in addition to the fourteen years which have already elapsed) because the Department has not yet done anything to prepare itself to adjudicate mineral selection applications.<sup>4</sup> The denial will presumably be subject to appeal but only, of course, on abuse of discretion grounds. The process must indefinitely be repeated for every mineral selection any state attempts to make until the state can convince an appellate tribunal at some level that the Secretary has arbitrarily refused to recognize value equivalence and the state's competence to protect the public interest. The states must approach selection in awareness of the Secretary's obsession that he must, as a function of his public trust, prevent the states from enjoying any possible advantage in the exercise of their selection rights.

The Secretary is quite capable, by sheer inaction, of defeating the states in their attempts to assert enabling act rights unless his function is the purely ministerial one which the lower courts have, in this case, perceived it to

<sup>3</sup>Secretary's Petition, page 21.

<sup>4</sup>Secretary's Petition's page 6.

be. Anyone who believes differently ignores history. It is not inappropriate to refer to the 1930 executive withdrawal of oil shale "temporarily" and for purposes of "classification." Half a century later, despite a scandalous national dependency on foreign fuel sources, the nation's oil shale is neither classified nor restored to leasing status,<sup>5</sup> and oil shale is making no present contribution to reduce the national energy deficit. The Amicus ascribes no evil motives to the Secretary, but history teaches us that his department is at least hopelessly inert. So far as Utah is concerned, the Secretary has effectively frustrated the objectives of its enabling act and blocked development of the major natural resource within its boundaries.

The Secretary suggests that the State of Utah is incapable of "managing public domain in a consistent and rational way" or giving appropriate weight to "overriding recreational, scenic and other environmental values."<sup>6</sup> Even if the State were the spiritually bankrupt entity the Secretary implies it to be the public interest is protected by federally administered environmental protection laws which are fully applicable without reference to land ownership. The assertion that state ownership of land "threatens" its "best management"<sup>7</sup> is not supported by the record or even any footnote data the Secretary has supplied. The accusation that the State is "profiteering" in asserting its rights in the statutorily prescribed manner is hardly an exhibition of diplomatic restraint.

<sup>5</sup>The oil shale leasing "program" to which the Secretary refers is limited to 20,000 acres, and resulted in the acquisition of oil shale positions by companies with substantial investment in foreign oil production and production facilities. The program was not even conceived until years after Utah commenced selection of the lands in question. Arguably, it was conceived *because* of state selection.

<sup>6</sup>Secretary's Petition, page 11.

<sup>7</sup>Secretary's Petition, page 12.

The tone of the Secretary's Petition reflects the departmental attitude which has been evident throughout this litigation. The Secretary sees the state as a supplicant without stronger claim for federal favor than any individual applicant for small tract purchase or other acquisition of rights in public land. He recognizes no federal obligation deriving from enabling acts, and unabashedly asserts that he (or at least the federal establishment) is the sole guardian of the public interest. The notion that federal agencies are infinitely wise and incorruptible has undergone significant erosion in the last decade. The Amicus submits that the lower courts have correctly assessed the role of the Secretary in the implementation of enabling act concepts. That assessment conforms with the popular feeling that management of public resources is best entrusted to states and local governments.

Respectfully submitted,

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**In the Supreme Court of the  
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**No. 78-1522**

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CECIL D. ANDRUS, Secretary of the Interior,

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ON PETITION FOR CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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**Brief for Amicus Curiae**  
**State of California (by and through its State Lands Commission)**

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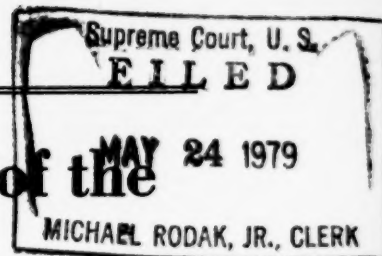
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ON PETITION FOR CERTIORARI TO THE  
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## Brief for Amicus Curiae

State of California (by and through its State Lands Commission)

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### INTEREST OF AMICUS CURIAE

California, like most of the other western states, was granted the sixteenth and thirty-sixth section in every township to be held and administered in trust for the perpetual benefit of the public schools. Act of March 3, 1853, 10 Stat. 244. The trust nature of the school lands grant is, as the court below indicated, unique, resembling in some degree the public trust in which the states hold their sovereign land. *Alabama v. Schmidt* (1914) 232 U.S. 168. In



the event any of the lands within this specific "in place" grant are not available by reason of preexisting rights of others, the states have historically had the right to select other land in lieu of such preempted acreages. *McCreery v. Haskell* (1886) 119 U.S. 327. The State of California has, as petitioners point out, outstanding rights to select approximately 180,000 acres of such school-indemnity lands. Other western states have corresponding interests. Petition for Certiorari, page 12, footnote 9.

Because of time considerations, we have been unable to circulate this brief for the review and approval of other affected states. However, we are authorized to represent that the following states, acting by and through their state land agencies and attorneys general, join us in urging this Court to grant certiorari and summarily affirm the decision below: Arizona, Nevada, Washington, New Mexico, and Montana.

#### QUESTIONS PRESENTED

1. Do the provisions of the Taylor Grazing Act confer discretion on the Secretary of the Interior to impose conditions on indemnity land selections made by states in addition to those set forth in sections 851 and 852, 43 United States Code?

2. Does the authority to classify lands set forth in section 7 of the Taylor Grazing Act (43 U.S.C. § 315(f)) give the Secretary the power, uncontrolled by any statutory standards to compare the value of lost base lands with the value of indemnity selections made by a state pursuant to its Congressional grant and decline to approve state selections if he determines their values to be disparate?

The states represented in this brief believe the decision below presents accurate answers to these questions. The Secretary of the Interior has suggested, however, the possibility that he may seek to restrict that decision narrowly,

thus necessitating multiple actions throughout the Ninth and Tenth Circuits. See Petition for Certiorari, p. 12, stating only that the Secretary "may deem himself compelled" to apply the decision equally throughout the circuits. Although the law is clear, the need for uniformity of decision on this important question of federal-state relations compels summary affirmance by this Court.

#### ARGUMENT

##### I. The Discretion of the Secretary of the Interior in His Review of Indemnity Selections Is Limited to That Conferred on Him by Statute. He Is Neither Impliedly Nor Expressly Authorized to Impose Additional Conditions on the Statutory Rights of States to Lieu Lands

The policy of making "in place" grants and in particular, school land grants, to the newly-admitted states dates back at least to 1785. As the court below points out, it was established as a quid pro quo to compensate newly-admitted states for revenues lost when, as a condition to their admission, they were prohibited from taxing federal lands retained within their boundaries. *Utah v. Kleppe* (10th Cir. 1978) 586 F.2d 756, 758.

As settlement of the new states accelerated, the lands allocated to them increasingly became subject to claims by private persons before they could be surveyed and set aside. Similarly, sections were incorporated into federal reservations. In order to compensate states for lands thus lost, Congress provided for the selection of other public lands, so-called "lieu" lands, in their place. A state may waive its rights to particular school land parcels and elect to acquire such lieu lands instead. Presently, the prerequisites for such selections are set forth in sections 851 and 852, Title 43, United States Code. Once it appears that these requirements have been met, it becomes the duty of the Secretary

of the Interior to approve and "clear-list" the selection. The state concerned acquires an equitable interest in the lands as of the date of the initial selection, and legal title upon the Secretary's clearance. *Payne v. New Mexico* (1921) 255 U.S. 367. Concurrently, the United States acquires a similar interest in base lands in which the state has waived its rights. *California v. Deseret Water Co.* (1917) 243 U.S. 415.

Statutory references to the "approval" by the Secretary of such selections have consistently been construed as merely giving him the duty of ascertaining whether the selection complies with applicable statutory conditions. *Payne v. New Mexico*, *supra*, 255 U.S. at 371; *Wyoming v. United States* (1921) 255 U.S. 489, 502-503.

The standards for selection of "lieu lands" are set forth currently in section 852, title 43, United States Code. Insofar as is relevant here, that statute permits the selection of such lands "from any unappropriated, surveyed or unsurveyed public lands within the state where such losses or deficiencies occur, subject to the following restrictions:

"(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

"(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State . . ." 43 U.S.C. § 852.

The record below on which the Court of Appeals relied indicates that, prior to 1967, the Secretary of the Interior did not believe himself authorized to consider disparity of values between base lands (i.e., lands unavailable because

of preexisting rights or federal reservation) and lands selected. E.g., Memorandum of September 14, 1962, Associate Solicitor, Division of Public Lands, to Director, Bureau of Land Management, Utah's Appendix B; Memorandum of February 11, 1943, Commissioner of the General Land Office to the Secretary, both cited in *Utah v. Kleppe*, *supra*, 586 F.2d at 762-763. In 1967, the Secretary reversed himself, and adopted the policy that, relying on his discretion under section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve "grossly disparate values." *Id.*, 586 F.2d at 762. This reinterpretation of the Act was taken notwithstanding rejection by Congress, in the preceding year, of legislation that would have amended the indemnity statutes to incorporate the equal value concept. In 1966 sections 2275 and 2276 of the Revised Statutes (43 U.S.C. §§ 851-852) were amended to liberalize the indemnity selection program. P.L. 89-470; 80 Stat. 220. In its report on this legislation, the Department of the Interior stated:

"The bill does not deal with the equal value concept with respect to lands valuable for leaseable minerals involved in State selections. We have previously recommended language designed to resolve this problem. Our primary purpose was to inform the Congress of the facts, and to give the Congress an opportunity to legislate on the subject if it wishes to do so. In the House of Representatives, H.R. 16 embodies the equal value concept. The House committee tabled that bill after hearings, and reported H.R. 5984 without the equal value concept. The problem was called to your attention in our report on S 1883. We believe the subject merits consideration by your committee. In our prior reports we stated a preference for legislation which included this concept, but indicated no objection to the enactment of a bill without it." Sen.Rep. No.



1213, 2 U.S. Code & Adm. News, 89th Congress, 2nd Sess. (1966).

Thus it appears that the Secretary took it upon himself to accomplish administratively what Congress declined to do legislatively.

Each time the Secretary has attempted to assume greater discretion than that plainly given him by the applicable statute in indemnity programs, he has been rebuffed by the courts. Thus, attempts to withdraw lawfully selected lands because of subsequent developments have consistently been declared to be unlawful. E.g., *Payne v. New Mexico*, *supra*, 255 U.S. 367 (state selection met statutory requirements when made; base tract subsequently withdrawn from federal reservation); *Wyoming v. United States*, *supra*, 255 U.S. 489 (state selection met statutory requirements; land subsequently found to be mineral-producing).

The recent decision in *Bronken v. Morton* (9th Cir. 1973) 473 F.2d 790, cert. denied 414 U.S. 828, is particularly analagous. There, the Secretary made a decision similar to the one under attack here to set a ceiling on the value of lands available to holders of "valentine" scrip, which gave its holders the right to select equal quantities of unappropriated public lands in place of lands held by them under Mexican grants and subsequently lost to claimants under United States patents. The Court held his action to be unauthorized: "Congress placed no value limitations on the lands which might be selected under (the Act). Notwithstanding (its) clear provisions and the state of existing law at the time of the Act's passage, the Secretary refused to process applications for land he deemed too expensive." *Id.* at 795. Thus his action in so doing was held to be unlawful.

## II. Nothing in the Taylor Grazing Act Confers Discretion on the Secretary of the Interior to Impose Additional Conditions on State Indemnity Land Selections

Since the Secretary of the Interior was unable to persuade Congress to grant him direct authority to impose the equal value test on indemnity selections, he attempted to fall back on his powers to classify certain lands under the Taylor Grazing Act. His contentions thus raise the issue as to whether Congress in enacting the Taylor Grazing Act in 1934 (43 U.S.C., § 315 et seq.) intended to impose an "equal value" rule on the states in their selection of lands to compensate them for losses in the grant of school lands. The district court and court of appeals held, correctly, it did not. We do not propose here to detail the complete history of the Taylor Grazing Act nor the provisions relating to the selection of "lieu" lands as indemnity for losses in the school land grants. These have already been set forth in illuminating detail in the brief of the State of Utah and in the decision of the court of appeals itself. We fully agree with the contentions and arguments set forth in that brief and the decision of the court of appeals. We would, however, like to take this opportunity to set forth the salient points raised to show this Court that the decisions below were entirely correct in reaching the conclusion that the "equal value" premise advanced by the Secretary of the Interior can have absolutely no applicability to indemnity selections made by the states.

We begin with the basic premise that the school land grants were the result of and comprise a portion of a compact made by and between the states and the United States. The basic terms of this compact were that the states would not tax public lands owned by the United States; nor would they interfere with the disposition of those lands by the federal government. In return the United States granted



various sections of land to the states in trust for the support of schools. (*State of Nebraska v. Platte Valley Power & Irr. Dist.* (Neb. 1946) 23 N.W.2d 300.) Further, this compact or trust is not grounded entirely on a contract theory but directly springs from the fundamental constitutional requirements of the "equal footing" doctrine. (See, e.g., *U.S. v. Morrison* (1916) 240 U.S. 192; *Heydenfeldt v. Daney Gold and Silver Min. Co.* (1876) 93 U.S. 634.)

The second basic premise is that state indemnity selections are governed by sections 851 and 852 of title 43 of the United States Code and these sections clearly and unequivocally state that indemnity selections shall be made on an acre for acre basis.

It is apparently conceded by the Secretary that at least prior to 1934 there was no "equal value" provision in a state school indemnity selection and the states were free to select lands on a per acre basis for losses due to federal reservations for national parks and forests and other causes. (See e.g., 43 U.S.C. 851, 852.) However, in 1934, Congress enacted the Taylor Grazing Act. The purpose of the act was to:

"... halt the destructive use of the public rangelands and to prevent the continued breakup of natural grazing areas by homesteading, which was taking the land with access to water and leaving useful grasslands without any water." (*History of Public Land Law Development*, Public Land Law Rev. Com., ch. XXI, p. 607.)

Now the Secretary contends that this act—having the express purpose of preventing the destruction and degradation of natural grazing acres—gives him the power to thwart the entire purpose of the congressional grant to the states to support public schools and to breach the covenant between the United States and the states by giving him the discretion to disapprove any state selection for a wide

variety of reasons not solely confined to "equal value." (See, e.g., Petition for Writ of Certiorari p. 11.) No such congressional intent can be gleaned from the Taylor Grazing Act. *Payne v. New Mexico*, *supra*, 255 U.S. 367 and *Wyoming v. United States*, *supra*, 255 U.S. 489, both hold that the Secretary's duties in indemnity selections are not discretionary in nature. These holdings have been affirmed in *Lewis v. Hickel* (9th Cir. 1970) 427 F.2d 673, cert. den., 400 U.S. 992 (1971) and *Wilcoxson v. United States* (D.C. Cir. 1963) 313 F.2d 884.

The Taylor Grazing Act makes no direct reference to state lieu selections. Indeed the act states:

"Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State." (43 U.S.C. sec. 315.)

The import of this language is clear. The states (as the Secretary concedes) are entitled to the school land sections in place in lands subject to the act. Unless the act *expressly* provides otherwise, their rights to "initiate" lieu land selections likewise remain as before. In short, there is nothing at all in the act which "expressly provides" that the Secretary is granted additional authority with respect to lieu or indemnity selections as those selections relate to school lands. Indeed the language of section 315 is an express recognition by Congress of the sanctity and importance of the school land grant.

Even, assuming for the sake of argument that the Taylor Grazing Act *could* be construed to give the Secretary some measure of discretion, it must be construed in favor of the

states. In *Wyoming v. United States*, *supra*, 255 U.S. 489, the court established that statutes under the school land grant are to be "construed liberally rather than restrictively." (*Id.* at p. 508.)

Finally, the Secretary in his petition asserts a myriad of dire consequences should the states be allowed to select lands without an equal value rule including loss of revenues and timber. We would like to note that Congress could have established an equal value rule had it wished on several occasions when it amended sections 851 and 852. Indeed, it had no trouble establishing certain value and acreage tests in section 315g(c) of the Taylor Grazing Act. But Congress did not. Instead, it established a scheme whereby mineral lands must be exchanged for mineral lands and whereby the states cannot select land under mineral lease or permit in a producing or producible status.<sup>1</sup> The provisions were obviously enacted to protect the interests of the United States and to promote a certain degree of equality. However, if some inequality does exist in these statutes it is the people of the various states and not private interests which benefit. These lands and proceeds from these lands in the last analysis are held in trust by the states and benefit not only the people of the respective states but the people of the entire nation, through increased educational opportunities and benefits.

In conclusion, the district court and the court of appeals were correct in their well-reasoned decisions that the Taylor Grazing Act does not impact the school lands selection process. And, as the decisions of the district court and

1. Indeed it was only after the Attorney General halted the Secretary from instituting the "equal value" rule through a broad definition of a "producing or producible status" that the Secretary adopted the equal value test. (See, e.g., 70 I.D. 65.)

the court of appeals show even if the Taylor Grazing Act could be construed to give the Secretary some discretion with respect to school indemnity selections, such discretion does not include an "equal value" formula.

### CONCLUSION

It is axiomatic that administrative agencies have only the power which Congress chooses to confer upon them. And it is clear that Congress has, through the years, reexamined the statutes governing state indemnity selections carefully, accepting some amendments and rejecting others. If there is any consistent pattern in the development of these laws, it is one of liberalization by Congress, opposed to reluctance by the Department of the Interior to implement Congressional programs leading to the release of lands to the states. Had Congress intended to authorize the Secretary to impose the equal value test, it would have done so by adopting the amendment he offered in 1966. Had Congress intended by enacting the Taylor Grazing Act to confer upon the Secretary discretion to impose such a test it might reasonably be assumed that the Secretary would not have deemed it necessary to offer his 1966 amendment. In any event, the Taylor Grazing Act, intended as it was to prevent private abuse of the public domain, is a slender reed on which to rest such a substantial encroachment of the rights of states to indemnity selections.

The Court of Appeals construed the law accurately below. In different circumstances, Utah's neighboring states in the ninth and tenth circuits might be satisfied to let the decision stand and to resist certiorari. But the Secretary has put us on notice only that he "may" follow the rule of

*Utah v. Kleppe* in both the Ninth and Tenth circuits. Petition, p. 12. The equivocal nature of his statement is pregnant with sinister possibilities. If the Secretary continues to adhere to the equal value rule with the tenacity and supple logic which he has heretofore applied, a multiplicity of actions throughout the western states may follow. The only means by which this salutary rule can be applied equally and equitably among the states to which it applies, with any certainty, is by summary affirmance by this Court.

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No. 78-1522

Supreme Court, U. S.

FILED

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HUGH S. BOBAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
PETITIONER

v.

STATE OF UTAH

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-53a) is reported at 586 F.2d 756. The opinion of the district court (Pet. App. 54a-79a) is not reported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 80a) was entered on August 8, 1978. A petition for



rehearing was denied on December 6, 1978 (Pet. App. 81a-82a). On February 27, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including April 5, 1979 (A. 81). The petition was filed on that date and granted on June 11, 1979 (A. 82). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether public lands withdrawn from all forms of private appropriation and placed within a federal grazing district may be selected by a state in lieu of lost school-grant lands without first being classified as available for that purpose by the Secretary of the Interior pursuant to his discretionary authority under Section 7 of the Taylor Grazing Act.

2. Whether the Secretary, in the exercise of such discretion, may decline to classify as open to selection lands which are "grossly disparate" in value to the lost school lands.

### STATUTES INVOLVED

The relevant statutes are:

1. Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109;

2. Sections 2275 and 2276 of the Revised Statutes, as amended, 43 U.S.C. 851-852; and

3. Sections 1 and 7 of the Taylor Grazing Act of June 28, 1934, 43 U.S.C. 315 and 315f.

These provisions are reproduced in the Appendix, *infra*, 1a-11a.

### STATEMENT

1. As the United States expanded in the 19th century and new states were created out of areas that had previously been federal territories, Congress granted the new states certain lands for school purposes. The states agreed to hold and administer these lands under a permanent trust for the benefit of the local public school system (Pet. App. 13a, 70a). In particular, when Utah was admitted to the Union in 1896, the new state was granted four numbered sections in every township "for the support of common schools." See Section 6 of the Utah Enabling Act of 1894, ch. 138, 28 Stat. 109.<sup>1</sup>

In making these land grants, Congress recognized that in some instances the designated numbered sections, the so-called "grants in place," had already

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<sup>1</sup> The amount of school land granted to each state varied. Utah, Arizona, and New Mexico, in part because of the large desert areas contained in those states, were the only ones to receive four sections in every township throughout the state. Ohio, the 17th state, was the first to receive a school land grant. Congress granted it one section in every township. 2 Stat. 175. Most states received one section per township, until Congress established a government for the Territory of Oregon in 1848. The Organic Act for Oregon, 9 Stat. 330, reserved two sections in every township for school purposes. The first state that actually received a school grant of two sections per township was California, the 31st state, in 1853. 10 Stat. 246. The promise of two sections to Oregon was fulfilled when Oregon became the 33rd state in 1859. 11 Stat. 383. Most states admitted to the Union in the second half of the 19th century received two sections in every township for school purposes. See generally P. Gates, *History of Public Land Law Development* 288-318 (1968).

been "sold or otherwise disposed of" under the authority of other federal statutes (*e.g.*, the Homestead Act of 1862, 12 Stat. 392) and were therefore unavailable to the states for school purposes. Accordingly, it was provided that, in such circumstances, the affected state could select other federal lands equivalent to the lost grants in place.

Section 6 of the Utah Enabling Act, like several other statutes offering admission to a new state, declared that these indemnity or in-lieu selections should be made "in such manner as the [state] legislature may provide, with the approval of the Secretary of the Interior \* \* \*." State acquisitions of land through indemnity selection are also regulated by general statutes enacted at various times both before and after Utah joined the Union. See Rev. Stat. 2275 and 2276, as amended, 43 U.S.C. 851 and 852; Sections 1 and 7 of the Taylor Grazing Act, 43 U.S.C. 315 and 315f. At issue in the present case is the extent of the discretion that the Secretary of the Interior may exercise in approving indemnity selections under the statutory scheme that Congress has established.<sup>2</sup>

<sup>2</sup> Because the western states are the ones most recently admitted to the Union and because Utah and Arizona are two of the three states that received particularly large grants, the remaining indemnity selection rights are concentrated in seven western states. Utah and Arizona alone hold nearly 70% of the outstanding indemnity rights. The approximate number of acres still to be selected in each state (and thus the approximate number of acres potentially affected by this lawsuit) is as follows: Arizona, 170,000 acres; California,

2. Between September 1965 and November 1971, Utah filed with the Secretary indemnity selections covering approximately 157,000 acres (Pet. App. 56a-61a).<sup>3</sup> The Secretary and the State engaged in informal negotiations directed toward enabling the State to select indemnity lands in large blocks, but the Secretary did not act on any of the selections actually filed. The passage of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, generated further delay, because of the possibility that the Secretary's approval of Utah's selections would be deemed a "major Federal action" requiring preparation of an environmental impact statement.

Meanwhile, in 1973 and early 1974, while Utah's indemnity selections were pending, the Secretary developed a prototype oil-shale leasing program to facilitate testing of alternative methods of extracting oil from shale deposits.<sup>4</sup> The Secretary announced that he would conduct public bidding for several leases, including two in Utah. Each Utah lease was to cover a tract of 5,120 acres, and all the land cov-

108,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres.

<sup>3</sup> All the land selected by the State is located in Uintah County. Most of the 194 parcels designated are 640-acre survey sections or parts of such sections. The only exceptions are the final three selections, filed in November 1971, each compromising approximately 11,000 or 12,000 acres.

<sup>4</sup> A description of the leasing program was published in the Federal Register. See 38 Fed. Reg. 33186 (1973); 39 Fed. Reg. 7475 (1974); 39 Fed. Reg. 11208 (1974).



ered by the two leases was located within the areas selected by Utah in satisfaction of its outstanding indemnity rights (Pet. App. 61a-62a).

In January 1974, the Governor of Utah wrote to the Secretary and stated that Utah "did not wish to interfere with the letting of these leases under the proposed bidding procedure" (A. 60). The Governor promised that "the pendency of [Utah's] selection application would not be construed as a cloud on the title of these tracts and that the State of Utah would recognize the right of the lessee under any lease granted on these tracts by the U.S. Government" (*ibid.*).

In his return letter, dated February 14, 1974, the Secretary stated (A. 61):

As you know, the Department of the Interior has not yet acted upon the State's [indemnity] applications. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate val-

ues, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication.

The following day a similar letter was sent by the Solicitor of the Department of the Interior to Utah's Attorney General (A. 63).

On February 22, 1974, the United States and Utah entered into an agreement concerning the proposed oil-shale leases (A. 64-66). The agreement reflected the Governor's commitment that the State would not attempt to obstruct the leasing program and would abide by the terms of any leases issued, in the event the State "is or becomes vested with any right or interest in the lands or minerals contained within [the leased tracts]" (A. 65).

3. The State filed the present action on March 4, 1974.<sup>5</sup> The State's complaint sought title to the acreage selected or, alternatively, an order directing the Secretary to approve or disapprove the State's selections without reference to the disparate values of the selected lands and the lost grants in place. In due course, the parties entered into a stipulation identifying the contested issues of law in the case: (a) whether the State's selections can be effective unless the identified lands are first classified by the Secretary, under Section 7 of the Taylor Grazing Act, as suitable for satisfaction of school indemnity selection

<sup>5</sup> The prototype oil-shale leases were awarded and executed soon after this action was filed (Pet. App. 62a).



rights; and, if not, (b) whether, in making the required classification, the Secretary may consider the "comparative values" of the selected lands and the lost sections; and (c) whether such a classification constitutes a "major Federal action" under Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), with the possibility that an environmental impact statement would have to be prepared (A. 31). Both the Secretary and the State moved for summary judgment.<sup>6</sup>

The district court ruled in favor of the State (Pet. App. 54a-79a). The court directed the Secretary to complete a "ministerial, administrative adjudication" resulting in "a determination as to whether those selection lists [comprising the disputed acreage] are in factual compliance with the requirements of 43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands" (Pet. App. 77a).<sup>7</sup>

<sup>6</sup> In addition, the State sought an order requiring the Secretary to pay the receipts from the two prototype oil-shale leases into the registry of the district court during the pendency of this case. The district court granted this relief and instructed its clerk to deposit equal portions of the impounded leasing receipts in four Salt Lake City banks, the receipts then to be invested by the banks in 90-day Treasury bills. On appeal, those orders were affirmed. When the petition for a writ of certiorari was filed in April 1979, the accumulated lease revenues exceeded \$72 million. For the reasons stated in the petition (Pet. 7 n.4), the Secretary did not seek review of the propriety of the district court's impoundment of the lease receipts.

<sup>7</sup> The judgment originally provided that this administrative adjudication should be completed no later than Decem-

The district court further held that classification under Section 7 of the Taylor Grazing Act was not required with respect to lands selected by the State under Section 852, and that the Secretary's contrary regulations were "void." Finally, the court concluded that the National Environmental Policy Act was inapplicable (Pet. App. 74a).

On appeal by the Secretary, the Tenth Circuit affirmed the district court's judgment in its entirety. The court of appeals stated that the school land grant statutes must be treated as "*special acts* completely separate and apart from all other public land grant enactments \* \* \* and given special, independent treatment" (Pet. App. 40a; emphasis in original). The court stressed that the purpose of these acts was "*to create a binding permanent trust which would generate financial aid to support the public school systems of the 'public land' states*" (Pet. App. 13a; emphasis in original). For this reason, the court concluded, "the solemn bilateral agreement between the United States and the 'Land Grant' State of Utah" conferred upon Utah the "unqualified, unambiguous right \* \* \* to select 'in lieu' school indemnity lands which are 'mineral in character' for the specific school lands granted which are 'mineral in character' but lost to the State" (Pet. App. 48a; emphasis in original). The court held that the State's right of selection overrides the Secretary's discretion under Section 7

ber 15, 1976. In October 1976, however, the district court stayed this requirement pending appeal to the court of appeals (see A.15). To date, neither court has entered any subsequent order setting a new deadline.

of the Taylor Grazing Act to classify lands as open to selection. The court ruled first that Section 7 is inapplicable to the Secretary's processing of state indemnity selections (Pet. App. 39a). Alternatively, the court decided that, in this context, Section 7 classification is not discretionary and may not take into account the comparative values of "base" and selected lands (Pet. App. 49a).

#### SUMMARY OF ARGUMENT

When Congress first provided for the replacement of lost school lands in 1826, it directed the Secretary of the Treasury to select the tracts that should be granted to the states in lieu of the unavailable numbered sections. The Secretary of the Interior succeeded to this authority in 1849, when Congress created the Department of the Interior.

Although Congress never expressed any intention to deprive the Secretary of full discretionary control over the selection of replacement tracts, compilation of the Revised Statutes of 1874 resulted in the omission of all reference to the Secretary in Sections 2275 and 2276, the revised and consolidated version of earlier statutes governing the selection of replacement lands. Explicit mention of the Secretary's role in the selection process was not restored in 1891 when Sections 2275 and 2276 were amended to provide for initial state selection of in-lieu lands. The Secretary's continuing participation in such matters was reflected, however, in a variety of contemporary sources, not least of which were the numerous state enabling

acts, including Utah's, that required the Secretary's approval for the perfection of state indemnity selections.

In two cases decided in 1921, this Court held that the Secretary's task in reviewing in-lieu selections filed by the states was essentially a ministerial one, limited to a determination of whether particular selections conformed with the requirements of Sections 2275 and 2276. *Payne v. New Mexico*, 255 U.S. 367 (1921); *Wyoming v. United States*, 255 U.S. 489 (1921). After *Payne* and *Wyoming*, the Secretary was no longer permitted to withhold his approval solely because he believed that a state's selection would not serve the public interest.

The passage of the Taylor Grazing Act in 1934 marked a return to greater federal control over the public lands. The Act authorized the Secretary to establish grazing districts from unappropriated and unreserved public lands and thereby to withdraw the lands included within such districts from "all forms of entry or settlement" (other than grazing in accordance with a permit obtained under Section 3 of the Act or homesteading on land that the Secretary had specifically classified, under Section 7 of the Act, as suitable for the production of agricultural crops). In particular, land placed in a grazing district, by virtue of its withdrawal from "all forms of entry or settlement," became unavailable for state selection in lieu of lost school lands.

Shortly after the Taylor Grazing Act was passed, President Roosevelt, in an exercise of his authority



under the Pickett Act of 1910, issued Executive Order No. 6910, temporarily withdrawing all unreserved and unappropriated public land in 12 western states, including Utah, from "settlement, location, sale, or entry," and reserving such land for classification, "pending determination of the most useful purpose" to which such land might be put under the Taylor Grazing Act. The Executive Order left virtually no public lands available for indemnity selection in lieu of lost school lands in the 12 named states.

Several months later, in June and July 1935, the Secretary of the Interior created and then expanded Grazing District No. 8 in northeastern Utah. This grazing district contained and still contains all the land covered by the Utah indemnity selections at issue in this case.

Meanwhile, Congress had come to recognize that Executive Order No. 6910 left too little opportunity, in the 12 affected states, for entry onto public lands for purposes other than grazing or homesteading. Accordingly, in 1936, Congress amended Section 7 of the Taylor Grazing Act so that any lands withdrawn under Order No. 6910 or through placement in a grazing district would become available for other purposes whenever the Secretary, in response to an application for "entry, selection, or location," exercised his discretion to classify the withdrawn lands as suitable for the purpose stated in the application. The legislative history of the amendment to Section 7 demonstrates that Congress wished to permit the

states to acquire withdrawn lands through indemnity selection, if the Secretary classified the selected lands as proper for that purpose.

The Secretary's regulations and administrative practice have consistently followed this interpretation of the Taylor Grazing Act and Executive Order No. 6910. The Secretary's view of his discretionary classification authority under Section 7 is entitled to substantial weight as the considered judgment of the Executive Branch officer entrusted with the responsibility for administering the public domain. Moreover, the discretion provided by Section 7 is necessary to enable the Secretary effectively to accommodate the competing aspects of the public interest frequently involved in decisions concerning the use and disposition of public lands.

In 1958 Congress authorized the states to select mineral lands to replace lost school lands that were mineral in character. Before this amendment of Section 2276, the states were prohibited from selecting mineral lands in lieu of lost school sections, regardless of the character of the original grants in place. The court of appeals in the present case has suggested that under the amended statute, the Secretary is obliged to approve Utah's indemnity selections of mineral land, if he determines that the lost school sections were also mineral. This is incorrect. The 1958 amendments did not affect the Secretary's discretion under Section 7 of the Taylor Grazing Act; they merely expanded the set of public lands among



which the states may choose in making their in-lieu selections. Indemnity selections of mineral lands, like all other indemnity selections, are subject to the Secretary's classification authority under Section 7. The legislative history of the 1958 amendments and of additional amendments to Sections 2275 and 2276 enacted in 1960 confirms that Congress intended no change in prior practice. The rule remains that a state indemnity selection "can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu right." H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960).

## II

In adopting a "grossly disparate value" policy to govern indemnity selections of mineral lands, the Secretary properly exercised his discretion under Section 7. Congress' stated goal in enacting the 1958 amendments to Sections 2275 and 2276 was to insure that the states would receive a fair cross section of land values as a result of their original school grants. The Secretary's policy helps to achieve that goal. States that have lost mineral lands may select other mineral lands as a replacement, but the substitute sections must be roughly equivalent in value to the lost grants in place. The Secretary's policy is thus designed to produce a distribution of mineral lands that fairly approximates what would have occurred had some of the original numbered school sections

not been lost to the states. The states are precluded only from using the indemnity selection program to obtain a windfall through selection of highly valuable public mineral lands in exchange for lost mineral sections of substantially less value.

The Secretary has adhered steadily to the "grossly disparate value" policy since at least 1965, and it is a reasonable guideline for the exercise of his classification authority under Section 7. Congress is aware of the policy's application to the Utah indemnity selections at issue in this case and has indicated its approval.

## ARGUMENT

### I. IN MAKING INDEMNITY SELECTIONS OF PUBLIC LANDS IN LIEU OF LOST SCHOOL-GRANT LANDS, STATES MAY SELECT LAND WITHIN FEDERAL GRAZING DISTRICTS ONLY IF THE SECRETARY OF THE INTERIOR CLASSIFIES THE LAND AS AVAILABLE FOR THAT PURPOSE, IN THE EXERCISE OF HIS DISCRETIONARY AUTHORITY UNDER SECTION 7 OF THE TAYLOR GRAZING ACT

Resolution of the central question presented in this case requires the Court to review a complex amalgam of statutes, executive orders, judicial decisions, and administrative interpretations bearing on the state indemnity selection program. The current legal situation cannot be fully understood without a review of the historical antecedents of the statutory authority that the states now enjoy to select mineral lands in certain circumstances. Once the significant events of the past 150 years have been identified and described, the basis of the Secretary's discretionary authority to classify lands available for indemnity selection will be readily apparent. Accordingly, we present a chronological account of the development of the indemnity selection program and the Secretary's role in the selection process.

#### A. The Congressional Decision to Appropriate Public Lands In Lieu of Unrealized School Grants

Long before Utah joined the Union, Congress provided for the replacement of school-grant lands that, for one reason or another, were unavailable to the states. States entering the Union during the first

half of the 19th century typically were granted a single numbered section, Section 16, in each township for the support of schools. Fractional townships, however, frequently lacked Section 16 and, as a result, the total school grant to each state proved smaller than Congress had intended. In 1826, Congress sought to remedy this problem by appropriating another tract of land for each fractional township that lacked a Section 16. 4 Stat. 179; 2 Cong. Deb. 2575-2576 (1826). The Secretary of the Treasury was directed to select the replacement tracts from any unappropriated public land within the land district encompassing the deficient township. (When Congress created the Department of the Interior in 1849, the Secretary of the new department assumed "all the duties in relation to the General Land Office \* \* \* [previously] discharged by the Secretary of the Treasury" (9 Stat. 395).)\*

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\* In addition to statutes of general applicability like the 1826 Act discussed in the text, enabling acts for the individual states ordinarily provided that when designated school sections had been "sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state \* \* \* for the use of schools." 3 Stat. 430 (1818) (Illinois). See also, *e.g.*, 2 Stat. 175 (1802) (Ohio); 3 Stat. 290 (1816) (Indiana); 3 Stat. 491 (1819) (Alabama); 3 Stat. 547 (1820) (Missouri); 5 Stat. 58 (1836) (Arkansas); 5 Stat. 59 (1836) (Michigan); 5 Stat. 789 (1845) (Florida and Iowa); 9 Stat. 58 (1846) (Wisconsin). None of these provisions said anything about the way in which replacement tracts would be selected. An 1803 modification of the Ohio Enabling Act appears to be the only exception in the first half of the 19th century. The statute provided that "the sections of land heretofore promised for the use of



In 1859, still many years before Utah became a state, Congress appropriated additional public lands to replace school-grant sections on which settlements

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schools, in lieu of such of the sections, No. 16, as have been otherwise disposed of, shall be selected by the Secretary of the Treasury, out of the unappropriated reserved sections in the most contiguous townships." 2 Stat. 226.

What appear to be the earliest legislative provisions expressly granting a state or territory some measure of control over its indemnity selections were passed in 1853. In the Organic Act for Oregon, adopted in 1848 (see note 1, *supra*), the Territory of Oregon was promised Sections 16 and 36 in each township for the support of schools. Then in 1853, Congress authorized the Territory's legislature, acting through the county commissioners or any other officers that it chose, to select unoccupied in-lieu lands to replace any of the reserved sections that were "taken and occupied under the law making donations of land to actual settlers, or otherwise" (10 Stat. 150). Similarly, the 1853 act establishing a territorial government for Washington reserved Sections 16 and 36 in each township for school purposes and then addressed the situation "where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof" (10 Stat. 179). In that event, Congress said, "the County Commissioners of the counties in which said sections \* \* \* are situated \* \* \* are \* \* \* authorized to locate other lands to an equal amount in sections, or fractional sections, \* \* \* within their respective counties, in lieu of said sections so occupied" (*ibid.*). By thus authorizing the county commissioners to "select" or "locate" replacement lands in the Territories of Oregon and Washington, Congress apparently did not intend completely to surrender federal control over the selection process. Indeed, only six years later, Congress made clear that a federal officer was to have the final word on the selection of in-lieu lands in the states and the territories. See the discussion of the 1859 act in the text, *infra*. In practice, the county commissioners apparently recommended appropriate replacement tracts to the Department of the Interior, and the selections became effective if and when

with a view to preemption had been made before survey. The act sustained such settlers' claim to lands previously reserved for school use and made available to the states "other lands of like quantity \* \* \* in lieu of such as may be patented by preemptors \* \* \*." 11 Stat. 385. Recognizing that some states had already been granted two school sections in each township, Congress updated the 1826 statute to refer to Section 36 as well as Section 16. The new law provided for the situation in which all or part of either Section 16 or Section 36 was missing for geographical reasons. It stated: "[O]ther lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional, in quantity, or where one or both are wanting by reason of the township being fractional, or

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they were approved by the Secretary. See, e.g., *Todd v. State of Washington*, 24 Pub. Lands Dec. 106 (1897).

A two-step referral system of this kind was explicitly described in the third 1853 statute that authorized local involvement in the indemnity selection process, the California land grant statute. (Unlike most states, California did not receive a grant of federal lands until three years after it entered the Union.) After granting the State Sections 16 and 36 in each township for the purposes of public schools, the 1853 law provided that "where any settlement \* \* \* shall be made upon [these] sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the [1826] act \* \* \* and \* \* \* subject to approval by the Secretary of the Interior." 10 Stat. 247. Congress plainly viewed this recommendation and approval procedure as compatible with the 1826 act, which provided simply that the Secretary of the Treasury (and later, the Secretary of the Interior) should select the appropriate lands.



from any natural cause whatever" (*ibid.*). The 1859 statute further provided that all the appropriated lands were to be selected in the same manner as those appropriated under the 1826 law, namely, by the Secretary of the Interior.

The 1826 and 1859 statutes were revised and consolidated in Sections 2275 and 2276 of the Revised Statutes of 1874. Although there is no indication that any substantive change was intended (cf. *Chapman v. Houston Welfare Rights Organization*, No. 77-719 (May 14, 1979), slip op. 2-5 (Powell, J., concurring), and sources there cited), the revised sections contained no reference to the Secretary of the Interior or the Secretary of the Treasury or any other government official as the person authorized to select unappropriated public lands for grants in lieu of lost school lands. Indeed, the revised sections did not include any description of the manner in which the replacement tracts were to be selected.

The next general enactment on the subject came from Congress in 1891, five years before Utah achieved statehood. The amended version of Sections 2275 and 2276 appropriated public lands to replace school-grant lands that were lost to the states because of settlement with a view toward preemption or homestead, inclusion in an Indian, military, or other federal reservation, the fractional character of a township or granted section, the mineral character of a granted section,<sup>9</sup> or other disposition by the United

<sup>9</sup> The congressional decision to provide for the replacement of school-grant lands lost to the states because of their mineral character reflected a recognition that at least some school-grant acts did not grant mineral lands to the affected

States. The new statute (26 Stat. 796-797) provided that replacement tracts in lieu of lost school-grant lands "may be selected" by the states "from any unappropriated, surveyed public lands, not mineral in character, within the State \* \* \* where such losses or deficiencies of school sections occur \* \* \*." The prohibition against the selection of mineral lands, it should be noted, applied even if the lost school lands were mineral lands.

Now, for the first time in a statute of general application,<sup>10</sup> the States were expressly given a role

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states, even if such lands were included within the numbered sections specifically reserved for school purposes. For example, in *Mining Co. v. Consolidated Mining Co.*, 102 U.S. 167 (1880), this Court held that the 1853 statute granting California Sections 16 and 36 in each township for school purposes did not cover mineral lands, even if those lands were found within the designated sections. Congress was familiar with the *Consolidated Mining* decision when it amended Section 2275 in 1891. See 22 Cong. Rec. 3465 (1891); S. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890). The committee report made clear that Congress did not regard the *Consolidated Mining* decision as limited to the particular statute granting school lands to California. The report stated (*ibid.*):

The United States Supreme Court has held \* \* \* that the policy of Congress was not to grant mineral lands to the States, and that such mineral sections did not pass under the grant. But the United States in retaining ownership of these mineral sections, and disposing of the same under the mineral law, receives a revenue therefrom, and the school grant is *pro tanto* diminished. Recognition of the right to indemnity for mineral school sections does not, therefore, add an acre to such grant, as the United States retain the mineral sections and dispose of same under the mineral law.

<sup>10</sup> Using the same language employed again in the Utah Enabling Act a few years later, enabling acts for six states, adopted by Congress in 1889 and 1890, provided that, where

in the selection of indemnity lands, and indeed, the Secretary of the Interior was not mentioned. The question naturally arises whether this was a complete reversal of policy, consciously taken by the Congress. The indications are to the contrary.

First, the failure of the 1891 Act expressly to recognize the role of the Secretary was never understood to relieve him of all responsibility in the matter. Obviously, the Department in charge of administering the public domain must be the agency through which state selections would be processed, if nothing more. As this Court said in *Wyoming v. United States*, 255 U.S. 489, 494 (1921), "[o]ther laws of general application \* \* \* required that the selections be made under the direction of the Secretary of the Interior." This is, moreover, confirmed by the contemporaneous Enabling Act provisions already noted (note 10, *supra*) and the Utah Enabling Act three years later (to be discussed in a moment), all of which required the affected state to obtain "the approval of the Secretary of the Interior" for its indemnity selections. It would be most strange if Congress were enacting

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school-grant sections had been "sold or otherwise disposed of" under the authority of a federal statute, equivalent indemnity lands were to be selected "in such manner as the [state] legislature may provide, with the approval of the Secretary of the Interior \* \* \*." 25 Stat. 679 (1889) (North Dakota, South Dakota, Montana, Washington); 26 Stat. 215-216 (1890) (Idaho); 26 Stat. 222-223 (1890) (Wyoming). These provisions were the first since the California land grant statute of 1853 (see note 8, *supra*) to refer explicitly to the role of state authorities in the selection of indemnity lands.

a wholly different scheme in a general statute which, presumptively, applied to these very states.

Nothing in the legislative history of the 1891 Act suggests that the statute was intended to work a radical change in the Secretary's role. For example, the amendments' principal proponent in the House, Representative Payson of Illinois, explained the changes that the bill would make (22 Cong. Rec. 3464 (1891)):

While somewhat voluminous in its details, there really is no change of existing law except in one particular, and that is that it gives to the school fund of the different States and Territories an increase in the land allotted for that purpose in case of reservations made by Congress for schools or colleges; that is, general grants of land for schools and colleges and other similar reservations. Then there is one other amendment in the bill which provides that the selections of land which may be lost to the school fund may be made in any portion of the State where agricultural land may be found, instead of in each land district as now. With these two exceptions there is no substantial change of existing law, except a modification of the administration of affairs in the General Land Office.

Similarly, the Senate report described the fundamental purpose of the 1891 law:

In the administration of the law, it has been found by the Land Department that the statute does not meet a variety of conditions, whereby the States and Territories suffer loss of these sections without adequate provision for in-



demnity selection in lieu thereof. Special laws have been enacted in a few instances to cover in part these defects with respect to particular States or Territories, but, as the school grant is intended to have equal operation and equal benefit in all the public land States and Territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded.

S. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890).

Likewise, the report from the Department of the Interior's General Land Office, forwarded to Congress by the Secretary, stated that S. 1395, the bill that became the 1891 Act, "is substantially a re-enactment of Sections 2275 and 2276, Revised Statutes," with certain enumerated additions, none of which concerned the Secretary's authority to approve or disapprove indemnity selections (S. Rep. No. 502, *supra*, at 2). Indeed, the report specifically declared that "the only change in the method of making selections is that which authorized the selections to be made from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory, instead of confining them to the same land district in which the losses or deficiencies occur, as heretofore" (*ibid.*). Interior's General Land Office plainly contemplated a continuation of its role in approving or disapproving indemnity selections. That is the only explanation for the statement in its report praising the 1891 amendments for "mak[ing] clearer and more specific the limits of selection of indemnity for lands lost in place, thereby simplifying and facilitating the

examination and passing upon indemnity selections in this office" (*ibid.*).

To be sure, the new statute spoke in terms of selections made by the State instead of the Secretary. But that was presumably no more than a recognition of the prevailing practice, under which the State indicated the replacement tracts it wanted and asked the Secretary to approve. For obvious reasons, that had always been the procedure. To confirm it was no change. It would, however, have been a drastic alteration of previous arrangements if the Secretary retained no power to disapprove a State selection when, in his view, the public interest would be better served by reserving the lands selected for other uses. Until this Court spoke to the question in 1921 (see pages 28-30, *infra*), it was not understood that such a dramatic change had occurred.

#### B. The Utah Enabling Act

When Utah was admitted to the Union in 1896, it became the first state to receive four sections in each township for school purposes. In addition to Sections 16 and 36, Utah received Sections 2 and 32. Section 6 of the Utah Enabling Act of 1894, ch. 138, 28 Stat. 109, provided that:

where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto \* \* \* are hereby granted to said State \* \* \*, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior \* \* \*.



Section 13 of the Act, 28 Stat. 110, specified that "all land granted \* \* \* as indemnity by this Act shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States" within the State of Utah.<sup>11</sup>

In 1902, Congress explicitly made Sections 2275 and 2276 applicable to Utah and stipulated that these general provisions should govern Utah's indemnity selections, notwithstanding anything to the contrary that may have been contained in the Utah Enabling Act. 32 Stat. 188-189 (now codified at 43 U.S.C. 853). There is no suggestion in the legislative history of the 1902 Act that its purpose was to eliminate the requirement in the Enabling Act that indemnity selec-

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<sup>11</sup> The Enabling Act said nothing about mineral lands that happened to lie within the numbered sections granted to Utah for school purposes. In *United States v. Sweet*, 245 U.S. 563 (1918), this Court followed its decision in *Consolidated Mining* (see note 9, *supra*) and held that Congress did not intend to grant mineral lands to the State, even if they were within the specifically designated school-grant sections. Nine years later, Congress reversed the rulings in *Sweet* and *Consolidated Mining* and provided that "the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections." 44 Stat. 1026 (1927). At the same time, Congress carefully noted that the new provision "shall not apply to indemnity or lieu selections" (44 Stat. 1027). The states remained barred, as they had been at least since 1891, from selecting mineral lands in lieu of lost school-grant lands. This prohibition applied even where the lost lands were mineral in character.

tions take place under the direction of the Secretary of the Interior and with his approval. The statute was intended simply to make certain that Utah could select its indemnity lands on an equal footing with all the states governed by the amended version of Sections 2275 and 2276. See H.R. Rep. No. 1415, 57th Cong., 1st Sess. (1902); S. Rep. No. 1192, 57th Cong., 1st Sess. (1902). Representative Sutherland of Utah, in remarks made on the floor of the House moments before passage of the 1902 law, explained the bill's objectives (35 Cong. Rec. 4113 (1902)):

[I]n the act of 1891 there is a provision for instance, that where these school sections are within an Indian reservation that the State need **not** wait until the reservation is opened, but may select school-indemnity lands in place of them. There is a provision in the act that where the sections are missing, either in whole or in part, that indemnity lands may be selected for them. These two provisions are not in the enabling act of Utah, but are in the general act of 1891, so that the result is that every other public-land State may select indemnity lands where the school lands are either within the limits of a reservation or found to be missing by reason of some natural condition, like the existence of a lake, except in the case of Utah; and this simply makes applicable to the State of Utah the provisions that prevail as to the other public land States.<sup>[12]</sup>

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<sup>12</sup> The 1902 statute provided that Sections 2275 and 2276 should be understood to cover all four of the school sections granted to Utah in each township, even though the 1891 law expressly refers only to "sections sixteen and thirty-six."

The consequence is that, for purposes of the present case, it makes no difference whether Utah's claim to selections is founded on the general 1891 Act or the Enabling Act.

C. This Court's decisions in *Payne v. New Mexico* and *Wyoming v. United States*

Although it is not altogether clear whether the Department of the Interior followed any consistent practice with respect to state indemnity selections in the years following the 1891 Act, there is no doubt that the Secretary sometimes asserted a discretion to disallow such a selection, even when <sup>at the time of</sup> the tract in question met the statutory test of being "unappropriated" and nonmineral in character. See, e.g., *Kinkade v. State of California*, 39 Pub. Lands Dec. 491 (1911); *State of Washington*, 36 Pub. Lands Dec. 371 (1908); *Swank v. State of California*, 27 Pub. Lands Dec. 411 (1898). See also 43 Pub. Lands Dec. 293 (1914). Somewhat indirectly, but effectively, this claim of power was brought to an end by two decisions of this Court in 1921.

The first of the cases was *Payne v. New Mexico*, 255 U.S. 367 (1921). At issue was the validity of the Department's "cancellation" of state selections that had been made in lieu of school grants in place, the original grants having been "waived," as the relevant statute permitted, when the sections were included in a National Forest. The basis of the cancellation was that, before the selections had been "approved" by the Secretary, the tracts in place had been restored to the public domain, thus defeating the premise for any lieu selection. This Court held that the validity

of the selections must be judged as of the date when the state completed their filing, not the time (more than a year later) when the Secretary considered them. The relevance of the decision here, however, is in its rejection of the government's argument that the Secretary's "approval" of the selection—which was required by the applicable statute—was a matter of discretion, and not a ministerial or "judicial" function. 255 U.S. at 371.

The same point was made, even more forcefully, in *Wyoming v. United States*, 255 U.S. 489 (1921). The factual setting in the latter case was the same, except that the refusal to approve the lieu selection was based on a Pickett Act withdrawal of the selected acreage (see page 31, *infra*) that occurred after the selection was filed but before the Secretary considered it. The Court held that the withdrawal came too late to be effective. But, in reaching that conclusion, the Court expressly rejected the suggestion that "the selection was merely a proposal by the State which the land officers could accept or reject." 255 U.S. at 496. Again, it was said that the action of the Department in "approving" such a lieu selection "was to be judicial in its nature." *Id.* at 497.

We may question whether these decisions, assimilating state indemnity selections to private entries and lieu selections, accurately translate the intent of the Congresses that wrote the selection statutes. It seems unnecessary to debate that matter now, however, because, in our view, the passage of the Taylor Grazing Act in 1934 and its amendments two years later, together with the issuance of Executive Order



No. 6910, effectively overturned *Payne* and *Wyoming* by restoring to the Secretary his traditional discretion to control the selection process in the public interest. After *Payne* and *Wyoming*, the critical question was whether a state indemnity selection sought land that was "unappropriated" and therefore available for selection under Section 2276 of the Revised Statutes, or whether the selection sought "appropriated" land, land that had already been withdrawn through settlement, reservation, or other disposition by the United States and that was therefore unavailable unless and until the withdrawal was lifted. After 1934, all public lands in Utah and several other states were withdrawn and could become available for indemnity selection or other entry only if the Secretary classified them as proper for that purpose, in his discretionary authority under Section 7 of the Grazing Act as amended in 1936.

**D. Presidential Withdrawals of Public Lands from the Set of "Unappropriated Lands" Available for In-Lieu Selections**

The President has long exercised the authority to effect temporary withdrawals of public lands from settlement, selection, or other disposition. This Court has sustained the President's power to make such withdrawals even without specific statutory authorization. *United States v. Midwest Oil Co.*, 236 U.S. 459, 467 (1915) (sustaining a 1909 Presidential Proclamation that withdrew certain petroleum lands in California and Wyoming from "all forms of location, settlement, selection, filing, entry, or disposal under

the mineral or nonmineral public-land laws").<sup>12a</sup> See also 54 Pub. Lands Dec. 353 (1934). Any doubts concerning the propriety of such Presidential action were removed by the passage of the Pickett Act in 1910 (43 U.S.C. (1970 ed.) 141). The Act provided:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States \* \* \* and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Although the statutory language refers only to withdrawals from "settlement, location, sale, or entry," it is clear that a valid Pickett Act withdrawal "appropriates" the affected land and renders it unavailable for state indemnity selection. See *Wyoming v. United States*, *supra*, 255 U.S. at 489, 508-509.<sup>13</sup> Indeed, this Court has held that a Pickett Act withdrawal will defeat even an original school grant, if the with-

<sup>12a</sup> In Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, Congress prospectively repealed the "implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) \* \* \*."

<sup>13</sup> The State prevailed in *Wyoming* not because a Pickett Act withdrawal is ineffective in making public land unavailable for indemnity selection, but only because the withdrawal in that case occurred after the State had already filed its selection and was thus too late to "appropriate" the affected land, in the Court's view.



drawal is announced before survey of the designated section. *United States v. Wyoming*, 331 U.S. 440 (1947) (1915 withdrawal held to reserve title in the United States, because survey of Section 36 in affected township not made until 1916).

Two Executive Orders, issued under the authority of the Pickett Act, have some bearing on this case.<sup>14</sup> The first is Executive Order No. 5327, issued by President Hoover on April 15, 1930. The Order withdrew all lands containing deposits of oil-shale from "lease or other disposal" and reserved such lands "for the purposes of investigation, examination, and classification." Of course, when it was issued, Executive Order No. 5327 did not affect the state indemnity selection process, because Section 2276 of the Revised Statutes, as amended in 1891, precluded the states from selecting any mineral lands in lieu of lost school grants (see page 21, *supra*). Later, however, when Congress decided to permit the selection of mineral lands in certain circumstances (see note 25, *infra*), it had to reckon with the 1930 Order, an order that remains in effect even today.

The second Executive Order relevant to the present controversy is No. 6910, issued by President Roosevelt on November 26, 1934. The significance of this Order cannot be appreciated without an awareness

<sup>14</sup> Although the Pickett Act was repealed by Section 704 (a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, the latter statute expressly provides that previous Pickett Act withdrawals shall remain in "full force and effect until modified." Section 701(c), 90 Stat. 2786.

of the basic provisions of the Taylor Grazing Act, enacted five months earlier. We therefore defer consideration of Executive Order No. 6910 until we have reviewed the relevant portions of the Taylor Act as Congress originally passed it in June 1934.

#### E. The Taylor Grazing Act and Its Aftermath

##### 1. *Relevant Features of the Act as Originally Passed: Section 1*

The stated purpose of the Taylor Grazing is "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration" and "to provide for the orderly use, improvement, and development of the public range \* \* \*." H.R. Rep. No. 903, 73d Cong., 2d Sess. 1, 2 (1934); S. Rep. No. 1182, 73d Cong., 2d Sess. 1, 2 (1934). To this end, the Act authorizes the Secretary of the Interior "in his discretion, \* \* \* to establish grazing districts \* \* \* of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States \* \* \*, which are not in national forests, national parks and monuments, [or] Indian reservations \* \* \*, and which in his opinion are chiefly valuable for grazing and raising forage crops \* \* \*." 48 Stat. 1269 (now codified at 43 U.S.C. 315).<sup>15</sup> The Act requires the

<sup>15</sup> Although the opening portion of Section 1 refers only to grazing districts created from "unappropriated and unreserved" public land, the Section's first proviso permits public lands already withdrawn or reserved for other purposes to be included in a grazing district, with the "approval of the head of the department having jurisdiction thereof." One practical consequence of this provision in 1934 was that oil shale lands withdrawn four years earlier by Executive Order No. 5327 could be included in grazing districts at the discretion

Secretary to publish notice of his intention to create a grazing district in a particular area and provides further that "publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of [*sic*; presumably should be "or"] settlement." 48 Stat. 1270.

This language in Section 1 of the Act is critical to the present case. It establishes that inclusion of public land in a grazing district "appropriates" that land and makes it unavailable for "all forms of entry or settlement." The Secretary's discretionary decision to include certain public lands in a grazing district thus operates similarly to a Pickett Act withdrawal. In particular, by withdrawing grazing district lands from "all forms of entry or settlement," the Secretary's decision to create such a district renders the affected lands unavailable for state indemnity selection. This result is consistent with the established effect of a Pickett Act withdrawal. Indeed, although the latter statute speaks only of withdrawals from "settlement, location, sale, or entry," after *Wyoming v. United States*, *supra*, and *United States v. Wyoming*, *supra*, there can be no doubt that a timely withdrawal under the Act also precludes indemnity selections in lieu of lost school lands. By the same token, although the Taylor Grazing Act refers only to withdrawal from "all forms of entry or settle-

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of the Secretary of the Interior, who, of course, is the "head of the department having jurisdiction" over public mineral lands. See *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 54 n.7 (1970).

ment," the latter phrase is properly construed to comprehend school-grant indemnity selections.

One additional provision in Section 1 of the Taylor Grazing Act merits explanation. It states that the Secretary's establishment of grazing districts shall not

affect any land heretofore or hereafter surveyed which, except for the provisions of this Act would be a part of any grant to any State \* \* \*.

This provision was not contained in H.R. 2835, the first version of the Act introduced in the 73d Congress. 77 Cong. Rec. 172 (1933). Nor was it included in the nearly identical H.R. 6462, introduced 10 months later. 78 Cong. Rec. 167-168 (1934). The language reproduced above was added to H.R. 6462 by the House Committee on Public Lands and was included in the bill as it was reported in March 1934. 78 Cong. Rec. 4224 (1934). See *To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 2835 and H.R. 6462 Before the House Comm. on Public Lands, 73d Cong., 1st and 2d Sess. 195 (1934).*<sup>18</sup>

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<sup>18</sup> As reported by the House Committee, the full sentence containing the phrase under consideration read as follows:

Such orders [*i.e.*, the Secretary's orders creating grazing districts] shall be so worded as to safeguard valid claims existing on the date thereof and shall not affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State.

At the subsequent Senate hearings on H.R. 6462, Senator Ashurst of Arizona expressed concern that the House's draft might not adequately protect existing water rights in the



The Committee did not discuss the reasons for this addition to Section 1, and the amendment was accepted on the House floor without debate. 78 Cong. Rec. 6365 (1934). Nor have we been able to find any testimony during the House hearings concerning the potential relationship between the proposed grazing districts and the school sections granted to the states years earlier. It is fairly certain, however, from later remarks in hearings before the Senate Committee on Public Lands and Surveys that the House Committee added the amendment to Section 1 because

western states (*To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 6462 Before the Senate Comm. on Public Lands and Surveys, 73d Cong., 2d Sess. 64 (1934)*). Apparently in response to this concern, the Senate Committee amended the House's sentence to read as follows (78 Cong. Rec. 11147 (1934)):

Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provision of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

The amendment was accepted by the Senate without debate. At conference, the House agreed to the Senate amendment, but added the phrase "validly affecting the public lands" after the words "existing law." H.R. Conf. Rep. No. 2050, 73d Cong., 2d Sess. 1, 4 (1934); 78 Cong. Rec. 12167, 12168 (1934). The Senate accepted this further amendment, and the version of the sentence reported by the Conference Committee is the one now found in Section 1 of the Taylor Grazing Act, 43 U.S.C. 315. There is no evidence that any of the changes made by the Senate Committee were intended to affect state indemnity selection rights.

it wished to protect the states' right to the enumerated school sections granted at or around the time each state joined the Union. See *To provide for the orderly use, improvement, and development of the public range: Hearings on H.R. 6462 Before the Senate Comm. on Public Lands and Surveys, 73d Cong., 2d Sess. 63-64, 164 (1934)*. See also Circular No. 1346, issued by the Department of the Interior's General Land Office, 55 Interior Dec. 192, 204-205 (1935).

It was understood in 1934, as this Court held 13 years later (see *United States v. Wyoming, supra*), that a federal withdrawal of public lands before survey would defeat a preexisting school grant. When the Taylor Grazing Act was passed, a substantial number of sections among those specifically granted to the states in state enabling acts had not yet been surveyed. The western states, in which most of this unsurveyed land was located, were apparently concerned that creation of grazing districts encompassing unsurveyed sections would constitute a federal withdrawal and would thus deprive the states of original school-grant sections. The House Committee amendment to Section 1 of the Act was added to avoid this problem and to ensure that states would not lose enumerated school sections through placement in a grazing district before survey.

Testimony from western state witnesses at the Senate Committee hearings demonstrates that, even after the House Committee amendment, all participants in the legislative process assumed that public lands placed in grazing districts would be unavailable for indemnity selection. Indeed, one witness sug-



gested that the Act be further amended to empower the states to select land withdrawn for grazing district purposes (Senate Hearings, *supra*, at 162-165),<sup>17</sup> and other witnesses, including the Governor of Wyoming, contended that an amendment should be added to give the states an absolute right to exchange school sections already held by the states for previously unappropriated public lands placed in grazing districts (*id.* at 198-200, 211-215, 217). No such amendments were adopted, and the plain implication of the testimony at the Senate hearings is that the House amendment alone was insufficient to preserve the availability of grazing district land for indemnity selection.

## 2. Executive Order No. 6910

Five months after the Taylor Grazing Act became law, President Roosevelt issued Executive Order No. 6910. The Order explicitly acknowledged the passage and purposes of the Act and declared that the President found it "necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act." Accordingly, the Order withdrew all unreserved and

<sup>17</sup> See also the comment of General Land Office Commissioner Johnson, reporting to Secretary Ickes on state reaction to H.R. 2385, the predecessor of the bill that became the Taylor Grazing Act:

A number of the States have objected upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections.

Reproduced in H.R. Rep. No. 903, *supra*, at 9; S. Rep. No. 1182, *supra*, at 7.

unappropriated public land in 12 western states, including Utah, from "settlement, location, sale, or entry," and reserved such land for classification, "pending determination of the most useful purpose" to which such land might be put under the Act, and "for conservation and development of natural resources." The Order stated that the withdrawal it effected was "subject to existing valid rights."

In February 1935, the Solicitor of the Department of the Interior rendered an opinion stating that "all prior applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order." 55 Interior Dec. 205, 210 (1935).<sup>18</sup> The unmistakable implication of

<sup>18</sup> The Solicitor's opinion also took the position that Executive Order No. 6910

applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of the United States by reason of the termination of the outstanding appropriation, withdrawal, or reservation.

55 Interior Dec. at 207-208. This view was confirmed by Executive Order No. 7048, issued by President Roosevelt in May 1935. Thus, for example, oil shale lands previously withdrawn by Executive Order No. 5327, would automatically remain withdrawn under Order No. 6910, if, at some later date, the withdrawal effected by President Hoover's Order were revoked or terminated.

The Solicitor further stated in February 1935 that, in his view, Executive Order No. 6910 was not intended to forbid the inclusion in grazing districts of public lands with-

the Solicitor's words was that selections not yet filed at the time of the Executive Order could not be perfected because of the withdrawal of all unappropriated land in the affected states. This interpretation was confirmed two months later in an opinion of the First Assistant Secretary regarding a school indemnity selection list filed by the State of Arizona.<sup>19</sup> Because the list was filed in December 1932, long before Executive Order No. 6910, the Secretary ruled that it was an "existing valid entry" and therefore protected from the effect of the later withdrawal. *State of Arizona*, 55 Interior Dec. 249, 253-254 (1935). But the opinion left no doubt that further indemnity selections, filed after the Executive Order, could not be approved. In the Secretary's words, "The law provides that indemnity lands may be taken for the school sections lost, but through the withdrawal of all public lands, there is no indemnity land to be obtained." *Id.* at 253.<sup>20</sup>

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drawn from "settlement, location, sale, or entry" by the Order. Any doubt about the correctness of this aspect of the Solicitor's opinion was removed in January 1936, when President Roosevelt issued Executive Order No. 7274. That Order "exclud[ed] from the operation" of Order No. 6910 "all lands which are now, or may hereafter be, included within grazing districts \* \* \*, so long as such lands remain a part of any such grazing district."

<sup>19</sup> Arizona was one of the 12 western states named in Executive Order No. 6910.

<sup>20</sup> Because, as we observed earlier (see page 31, *supra*), a Pickett Act withdrawal announced before survey would defeat even a preexisting grant of specifically designated school sections, the states affected by Executive Order No. 6910 apparently feared that the Order deprived them, at least temporarily, of all original school-grant sections that had not

At the time of the *Arizona* decision in April 1935, then, it was well understood that Executive Order No. 6910 withdrew all unappropriated public lands in Utah and in the other 11 states named and left no such lands available for indemnity selections. Subsequently, in June and July 1935, the Secretary of the Interior issued orders creating and then expanding Grazing District No. 8 in northeastern Utah. Among the public lands included in that district were the lands that are now the subject of this lawsuit, *i.e.*, the 157,000 acres for which Utah filed indemnity selections between September 1965 and November 1971. The parties and the courts below agree that all the lands so selected are now located in a grazing district and were located in such a district at the time Utah filed its selections (Pet. App. 27a, 68a).<sup>21</sup>

But this did not release these tracts for selection. In light of the purposes of the Taylor Grazing Act and Executive Order No. 6910, it is hardly conceivable that the placement of these public lands in a grazing district in the summer of 1935 made them

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been surveyed by November 28, 1934, the date of the Order's issuance. To allay this concern, President Roosevelt, in April 1937, issued Executive Order No. 7599, which "exclud[ed] from [the] operation" of Order No. 6910 all lands, identified by survey after November 1934, which "would otherwise become a part of the school-land grant of designated sections to any of the States mentioned in the said order[.]" 43 C.F.R. 297.18 (1938); 2 Fed. Reg. 633 (1937).

<sup>21</sup> In July 1975, the Department of the Interior's Bureau of Land Management modified the boundaries of Grazing District No. 8 so that the district now includes, *inter alia*, all of Uintah County. At the same time, the district was redesignated as the Vernal Grazing District. 40 Fed. Reg. 32147 (1975).



immediately available for indemnity selection, notwithstanding the broad withdrawal ordered by the President only a few months before. Moreover, such a consequence with respect to lands previously withdrawn by Order No. 6910, would render wholly superfluous Executive Order No. 7274, issued by President Roosevelt on January 14, 1936 (see note 18, *supra*).

That Order "exclud[ed] from the operation" of Order No. 6910 all public lands placed in grazing districts, for as long as the lands remained in any such district. The President would never have taken such a step unless he believed that placement of public lands in a grazing district itself served to "appropriate" such lands and withdraw them from "all forms of entry or settlement." And, of course, there was good reason for that belief: Section 1 of the Taylor Grazing Act explicitly provided that such a withdrawal would result from the Secretary's inclusion of public lands within a grazing district.

### 3. *The 1936 Amendment to Section 7 of the Taylor Grazing Act*

Congress soon realized that the situation created by Executive Order No. 6910 was too inflexible. All the unappropriated public lands in 12 western states had been withdrawn from settlement or entry, and the Taylor Grazing Act did not generally authorize the Secretary of the Interior to decide that land originally placed in grazing districts could better be used for some other purpose. There was one limited exception in the Act as originally passed. Section 7 empowered the Secretary "to examine and classify"

grazing district lands "which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants" (48 Stat. 1272). In that case, the Secretary was further authorized "to open such lands to homestead entry \* \* \*."<sup>22</sup> This was, however, a restricted authority and, in the spring of 1935, Senators Ashurst and Hayden, both of Arizona, embarked on a plan to expand Section 7 and grant the Secretary discretion to permit a wide variety of entries on grazing district land, including entries through school indemnity selection.

Shortly after the 74th Congress convened, a bill was introduced in the House of Representatives to amend the Taylor Grazing Act in several ways not pertinent to this case. H.R. 3019, 74th Cong., 1st Sess. (1935); 79 Cong. Rec. 178 (1935). The House Committee on Public Lands conducted hearings on the bill and reported it favorably, with certain changes not relevant here. H.R. Rep. No. 479, 74th Cong., 1st Sess. (1935). The revised House Bill was then introduced in the Senate (S. 2539; 79 Cong. Rec. 5286 (1935)) and referred to the Committee on Public Lands and Surveys. Hearings were held in May and June 1935. On the first day of hearings, Senators Ashurst and Hayden offered an amendment to the bill. The proposed amendment added a new section designed to increase substantially the scope of the Secretary's discretionary authority under Section 7 of the Act. It provided:

<sup>22</sup> Section 7 stated: "Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry \* \* \* by the Secretary" (48 Stat. 1272).



[T]he Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive Order [No. 6910] \* \* \* or within a grazing district, which are more valuable or suitable for \* \* \* any other use than for the use provided for under this Act, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws \* \* \*. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry.

*To amend the Taylor Grazing Act: Hearings on S. 2539 Before the Senate Comm. on Public Lands and Surveys, 74th Cong., 1st Sess., pt. 1, 1-2 (1935).<sup>23</sup>*

Virtually the entire first day of hearings was occupied by the testimony of one witness, Richard Page, an attorney from Arizona who had been invited by Senators Ashurst and Hayden to explain

<sup>23</sup> The proposed Ashurst-Hayden amendment also adjusted the language of the proviso to the original Section 7 in order to require the Secretary to act on applications for classification of withdrawn land as more suitable for some purpose other than grazing (not necessarily homesteading). The new proviso read as follows (*Hearings on S. 2539, supra*, at 2):

[U]pon the application of any person qualified to make entry, selection, or location, under the public-land laws, \* \* \* the Secretary of the Interior shall cause any tract to be classified, and such application shall entitle the applicant to a preference right to enter, select, or locate such lands when opened to entry as herein provided.

(The word "person" in the first line of the proviso was changed to "applicant" by the Conference Committee. H.R. Conf. Rep. No. 1847, 74th Cong., 1st Sess. 6 (1935), reprinted at 79 Cong. Rec. 14011 (1935).)

the need for a revised Section 7. Page began by informing the Committee of the situation created by the Taylor Grazing Act and Executive Order No. 6910. He said (*Hearings on S. 2539, supra*, at 3): "[W]e are now tied up in just one general withdrawal of all public lands, and everything else in the public-land structure and in all of the public-land laws and the contractual relations between the Government—and I refer to existing exchange acts and everything—they have all ceased to function." Further testimony by Page and a responsive remark by Senator Hayden show that both men shared the view presented here: first, that indemnity school selections were barred by Executive Order No. 6910 and by the placement of public lands in grazing districts under the Taylor Grazing Act; and second, that the proposed revision of Section 7 would authorize the Secretary to permit state indemnity selections by classifying withdrawn land (including land in grazing districts) as available for that purpose. Page testified (*Hearings on S. 2539, supra*, at 13):

[T]his general withdrawal, to be followed by a tremendous amount of grazing districts, if there cannot be this provision for proper disposal for higher use and also having lands that can be applied for under the outstanding exchange laws, scrip laws, indemnity grants, and all those other existing contracts of the Government through prior legislation, if there is no land left where those rights can be exhausted, then there is going to be such an accumulating opposition to this whole Taylor Act, if development is

stopped on the one side, because you cannot have the land that you need for a higher use than grazing, and on the other hand if there is no land upon which all of these outstanding rights of selection or location can be used, [the] grazing administration will be just swamped with so much trouble that they won't have any time or opportunity to properly administer grazing \* \* \*.

Page then described a situation in which the government had granted private landowners in-lieu rights to select public lands in exchange for the property they then held, property that the government wanted to use for expansion of the Navajo Indian Reservation. He stated (*Hearings on S. 2539, supra*, at 15):

The remaining 15,000 acres desired for the extension of the Navajo Reservation, as to which the rights of selection have not been exercised, are still privately owned and will be until the right is exhausted by the patenting of lieu selections. If there is no land in Arizona which is open to entry, and there is none now, that exchange right cannot be used. Therefore the Indian Office will find one of these days that they have not got title back to their lands, and they have got privately owned lands in their reservations, and there is going to be quite a little antagonism to the grazing law by reason of the fact that they have not got their situation cleared.

And Senator Hayden responded (*ibid.*): "The same thing would be true of a grant made to a State for university purposes or an indemnity selection."

The Senate Committee adopted the Ashurst-Hayden amendment nearly verbatim<sup>23a</sup> and reported the bill, with this and other major amendments, to the full Senate. S. Rep. No. 1005, 74th Cong., 1st Sess. (1935). The Senate accepted the new version of Section 7, with the addition of a proviso, stating that mining entries under the Mineral Lands Leasing Act of 1920 ~~may~~<sup>could</sup> be made on withdrawn lands, without awaiting classification and opening by the Secretary. 79 Cong. Rec. 12176-12177 (1935). (The proviso's clear implication was that all other forms of entry did require such classification and opening.) The Senate

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<sup>23a</sup> It appears that the Senate Committee slightly revised the proviso in the Ashurst-Hayden amendment (see note 23, *supra*) to make clear that the Secretary would be under no obligation to approve applications for "entry, selection, or location." The Committee simply added the phrase "if allowed by the Secretary" to ~~the~~<sup>a</sup> version of the proviso initially suggested by the Senators from Arizona. As reported, the proviso read as follows (emphasis added):

[U]pon the application of any person qualified to make entry, selection, or location, under the public-land laws, \* \* \* the Secretary of the Interior shall cause any tract to be classified, and such application, *if allowed by the Secretary of the Interior*, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

The Senate Committee report (S. Rep. No. 1005, 74th Cong., 1st Sess. (1935)) did not note the addition to the language originally proposed at the Committee hearings, but other evidence indicate that the change was made at the committee level. No amendment to the proviso was introduced or discussed on the Senate floor (see 79 Cong. Rec. 12173-12181 (1935)), and the Conference Committee report reveals that the only change made at that stage was the substitution of the word "applicant" for the word "person" in the first line of the proviso (see note 23, *supra*).



then passed the amended bill (*id.* at 12181) and forwarded it to the House, which earlier had passed the version of the bill reported by the House Committee (*id.* at 8109). The Senate prevailed at conference (see H.R. Conf. Rep. No. 1847, 74th Cong., 1st Sess. (1935)), and the bill was forwarded to the President for his signature (79 Cong. Rec. 14392 (1935)). The President exercised a pocket veto and thus deferred amendment of Section 7 until 1936.

When the new session of the 74th Congress opened, a bill was immediately introduced in the House of Representatives that would have accomplished one of the goals of the legislation considered the previous year. As initially introduced, H.R. 10094 would have changed existing law in only one way: it would have raised the acreage limitation in Section 1 of the Grazing Act to permit 143 million acres of public land, rather than 80 million acres, to be placed in grazing districts. The House Committee on Public Lands quickly reported the bill (H.R. Rep. No. 2125, 74th Cong., 2d Sess. (1936)), and it passed the House after a perfunctory floor discussion. 80 Cong. Rec. 3815-3816 (1936).

When the bill reached the Senate, however, the Senate Committee on Public Lands and Surveys transformed it into a measure similar to the proposed statute vetoed by the President the previous year. Compare the texts at 79 Cong. Rec. 14011-14012 (1935) and 80 Cong. Rec. 10479-10480 (1936). As reported by the Senate Committee (S. Rep. No. 2371, 74th Cong., 2d Sess. (1936)), the proposed revision of Section 7 of the Act was identi-

cal to the 1935 version, except for the addition of one noteworthy phrase. The amended H.R. 10094 explicitly authorized the Secretary to "examine and classify" not only withdrawn lands (including grazing district lands) that are more valuable or suitable for a use other than grazing but also such lands that are "proper for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*; should be "scrip"] rights or land grant \* \* \*." With the addition of this phrase, there could no longer be any doubt that the revised Section 7 was intended to permit the Secretary to "unlock" withdrawn lands in order to make them available for school indemnity selection. Although, in view of the testimony at the 1935 Senate hearings recounted above, it seems clear that the original Ashurst-Hayden amendment was designed, *inter alia*, to restore the possibility of exercising in-lieu rights in states affected by Executive Order No. 6910, the embellished 1936 version accomplishes that end more straightforwardly.<sup>24</sup>

In the amended form reported by the Senate Committee, H.R. 10094 passed both the Senate and the

<sup>24</sup> Unfortunately, the Senate report on the amended H.R. 10094 was exceedingly terse. With respect to Section 7, it stated only that the revision was intended "to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing." S. Rep. No. 2371, *supra*, at 2. This was precisely the same language that the Committee had used a year earlier to describe the Ashurst-Hayden amendment, the revised version of Section 7 that was contained in the bill vetoed by the President and that, of course, did not include the new phrase added in 1936. See S. Rep. No. 1005, *supra*, at 2.



House in short order. 80 Cong. Rec. 10479-10480, 10624-10626 (1936). This time, the President signed the bill, and the current version of Section 7 became law. 49 Stat. 1976 (now codified at 43 U.S.C. 315f).

We have recited this detailed history in order to demonstrate that, notwithstanding the contrary views of respondent and the courts below, the matter of in-lieu selections generally and, in particular, school indemnity selections was very much within Congress' contemplation when it amended Section 7 in 1936. As early as the spring of 1935, Congress, the Department of the Interior, and knowledgeable persons in the western states recognized the drastic effect that Executive Order No. 6910 had had on the exercise of outstanding indemnity rights. No land was available for such selections because it had all been withdrawn by the Executive Order or reserved in grazing districts under the Act. The Ashurst-Hayden amendment was Congress' method of dealing with the problem. It authorized the Secretary to classify withdrawn land as appropriate for acquisition in satisfaction of outstanding lieu rights or, indeed, for any use other than grazing. But, at the same time, the revised version of Section 7 retained the original sentence providing that withdrawn lands (including grazing district lands) "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." See note 22 and accompanying text, *supra*. Thus, while the Secretary may now classify withdrawn and grazing district lands as available for any use for which they are suited, such classification is a prerequisite

under Section 7 for any entry for a purpose other than grazing. And acquisition by a state in lieu of lost school lands is such an entry, as *Wyoming v. United States, supra*, shows.

Ever since his decision in *State of Arizona, supra*, in 1935, the Secretary has consistently adhered to the position stated above. Formal regulations embodying this interpretation of the governing statute were first issued in 1943, 8 Fed. Reg. 7284-7285 (1943), and, with further elaboration, remain in effect to this day. 43 C.F.R. 2400.0-3, 2450.1-2450.8, 2621.2. Administrative decisions also have regularly proceeded on the premise that classification under Section 7 is a prerequisite for state acquisition of public lands through indemnity selections. See, e.g., *State of Arizona*, 59 Interior Dec. 317 (1946); *State of California*, 59 Interior Dec. 451 (1947); *State of California*, 67 Interior Dec. 85 (1960); *State of Utah*, 71 Interior Dec. 392 (1964). See also 42 Op. Att'y Gen. 173, 180-181 (1963) ("under Section 7 of the Taylor Grazing Act (43 U.S.C. 315f), [the Secretary has] discretion to determine whether particular lands should be made available for selection under section 2275 of the Revised Statutes"). In sum, the Secretary's views concerning the effect of Section 7 on the state indemnity selection process find ample support in the historical background of the Act and its 1936 amendments and in the available contemporary legislative materials. They derive further legitimacy from 40 years of uninterrupted practical application by the agency charged with the responsibility for administering the public land laws.

Moreover, the Secretary's approach makes eminently good sense from a policy standpoint. That is why Congress, as long ago as 1826 and 1859, when it first provided for state indemnity selections in lieu of lost school lands, chose to vest complete authority over such selections in the Secretary of the Treasury and his successor, the Secretary of the Interior. Indeed, as we have shown (see pages 20-25, *supra*), Congress never formally rescinded the Secretary's discretionary control over in-lieu selections, but that authority was eroded to a mere ministerial function by this Court's rulings in *Wyoming v. United States*, *supra*, and *Payne v. New Mexico*, *supra*. Through Executive Order No. 6910 and the Taylor Grazing Act, as amended, Congress and the President restored the Secretary's discretionary authority over indemnity selections to something approximating what it was when such selections were first permitted.

The major salutary consequence of this development was that it enabled the Secretary more effectively to exercise his responsibility for managing the public domain in a consistent and rational way designed to accommodate the many aspects of the public interest involved. The development of new energy sources, for example, must be encouraged without ignoring conservation needs or overriding recreational, scenic, and other environmental values. The careful weighing of competing considerations required by the Secretary's complex task cannot be performed successfully without a substantial degree of control over alienations from the public domain. Executive Order No. 6910 and Section 7 of the Act, as

amended, assure the Secretary the necessary authority to accomplish the varied objectives of the public lands program.

#### F. The 1958 Amendments to Sections 2275 and 2276 of the Revised Statutes

In 1958 Congress for the first time chose to allow states, under certain circumstances, to select mineral lands in lieu of lost school lands. When Utah joined the Union in 1896, and for more than 60 years thereafter, Section 2276 of the Revised Statutes flatly prohibited indemnity selections of mineral land (see page 21, *supra*). Now, under the 1958 amendments to Section 2275 and 2276, states may select mineral land to replace original school lands that were lost through appropriation before survey and that were mineral in character. Pub. L. No. 85-771, 72 Stat. 928 (codified at 43 U.S.C. 852(a)(1)).<sup>25</sup> The 155,700 acres  
151,000

<sup>25</sup> In permitting the selection of mineral lands, Congress had to make special provision for the oil shale lands withdrawn in 1930 by Executive Order No. 5327. At the suggestion of the Department of the Interior (see S. Rep. No. 1735, 85th Cong., 2d Sess. 9 (1958); H.R. Rep. No. 2347, 85th Cong., 2d Sess. 5 (1958)), Congress included in the 1958 amendments a statement that "[t]he term 'unappropriated public lands' as used in this section shall include \* \* \* lands withdrawn by Executive Order Numbered 5327 \* \* \*, if otherwise available for selection." 72 Stat. 929 (codified at 43 U.S.C. 852(d)(1)). But because of Executive Order No. 6910 (expressly made applicable to already withdrawn lands if and when such earlier withdrawal is terminated (see note 18, *supra*)), and because of the withdrawal of oil shale lands placed in grazing districts with the approval of the Secretary under the first proviso in Section 1 of the Grazing Act (see note 15, *supra*), oil shale lands in Utah are not "otherwise available for selection," unless they are first classified as such by the Secretary in accordance with Section 7.



selected by Utah between 1965 and 1971 are all said to be mineral in character and, correspondingly, Utah asserts that the lost school lands to be replaced were mineral in character (Pet. App. 21a). The accuracy of these representations is still to be determined but may be assumed for present purposes.

The court of appeals has suggested (Pet. App. 16a-17a) that, in view of the 1958 amendments to the state indemnity selection statute, the Secretary is obligated to approve Utah's in-lieu selections if he determines that the base lands lost by the State were mineral in character. But the court's opinion underestimates the significance of the Secretary's discretionary authority under Section 7 of the Taylor Grazing Act. To be sure, Utah is authorized under Sections 2275 and 2276 to select mineral lands to replace lost school lands that happened to be mineral. But that does not mean that the Secretary is required to approve every selection that meets the statutory criteria established in 1958. The 1958 amendments were intended only to make the selection of mineral lands possible, where it had previously been prohibited; they did not purport to restrict the Secretary's exercise of discretion under Section 7 of the Grazing Act. Where lost school lands were mineral, the 1958 amendments simply placed indemnity selections of mineral lands on an equal footing with other possible indemnity selections available to the states. With respect to all such selections of withdrawn or grazing district land, however, the Secretary retains the discretionary classification authority conferred on him by the revision of Section 7 in 1936.

The limited legislative history of the 1958 amendments supports this position. Assistant Secretary of the Interior Ernst, in submitting the Department's views on the proposed legislation to the House and Senate Committees on Interior and Insular Affairs, wrote:

We assume that nothing in this bill is intended to affect the rights or duties of States under other laws. In particular, we assume that no change is intended to be made in section 7 of the Taylor Grazing Act, as amended (43 U.S.C., sec. 315f).

S. Rep. No. 1735, 85th Cong., 2d Sess. 4, 11 (1958); H.R. Rep. No. 2347, 85th Cong., 2d Sess. 6 (1958). The Senate Committee "incorporated" the reports from Interior as a part of its own report (S. Rep. No. 1735, *supra*, at 2), and the House Committee explicitly stated that it concurred in the Department's comments concerning Section 7 (H.R. Rep. No. 2347, *supra*, at 2).

If any further confirmation were needed for the continuing applicability of the Secretary's Section 7 discretion to all indemnity selections, including selections of mineral lands, it was provided two years later, when Congress enacted additional amendments to Sections 2275 and 2276. Pub. L. No. 86-786, 74 Stat. 1024. The substance of the 1960 amendments is not pertinent to the present dispute, but the report of the House Committee on Interior and Insular Affairs leaves no doubt that the legislators primarily responsible for supervision of the public lands program recognized the Secretary's authority over indemnity selections of mineral lands, as well as other indemnity selections. The report stated:



A selection by a State can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu right, as provided in section 7 of the Taylor Grazing Act (43 U.S.C., sec. 315f).

\* \* \* The prohibition against the selection of [mineral] producing and producible lands subject to lease or permit would be continued [under the proposed 1960 amendments]. So also would the Taylor Grazing Act provision referred to above.

H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960).

Thus, the 1958 amendments do not derogate from the Secretary's discretionary authority under Section 7. On the contrary, the committee reports accompanying the amendments show that the revision of the indemnity selection statute was not intended to affect the Secretary's role in classifying public lands as proper for release from grazing districts or from the withdrawal effected by Executive Order No. 6910. Were it only for the context and legislative history of the Taylor Grazing Act and the undeviating administrative practice for forty years, the Secretary's interpretation of Section 7 would be entitled to substantial deference. *Udall v. Tallman*, 380 U.S. 1, 18 (1965). But when those factors are combined with explicit congressional recognition and approval of the Secretary's role in the indemnity selection process, it is difficult to appreciate how the court of appeals could be justified in reaching a different result. See *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors v. First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14. See

also *Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1 23-24 (1976); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

## II. APPLICATION OF THE SECRETARY'S "GROSSLY DISPARATE VALUE" STANDARD IN REVIEWING STATE INDEMNITY SELECTIONS OF MINERAL LANDS IS A PROPER EXERCISE OF THE DISCRETION CONFERRED BY SECTION 7 OF THE TAYLOR GRAZING ACT

After the 1958 amendments to the state indemnity selection statute, the Secretary faced the task of determining, under Section 7 of the Taylor Grazing Act, when to classify mineral lands as "proper for acquisition" in satisfaction of outstanding lieu rights. In particular, he needed to decide how to respond to state selections of high-value mineral lands in lieu of lost school lands that, although mineral in character, were worth substantially less. The remaining question presented in this case is whether the Secretary has permissibly exercised his discretion in declining to classify as available for indemnity selection mineral lands whose value is "grossly disparate" to that of the lost school sections they are intended to replace.

A. Nothing in the language of Section 7 purports to compel the Secretary to classify particular lands in a particular way or to limit the reasons for which he can refuse a requested classification. The phrase "in his discretion" at the beginning of the Section modifies all that follows. In cases not involving state indemnity selections, the courts have recognized that the Secretary enjoys broad discretion over the classi-

fication process. E.g., *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); *Pallin v. United States*, 496 F.2d 27, 34 (9th Cir. 1974). And one court has expressly held that "the market value of the lands being classified" properly may be considered in the exercise of the "broad powers and manifold options" granted the Secretary by the Taylor Grazing Act. *Boothe v. Hickel*, 347 F. Supp. 1273, 1276 (D. Nev. 1969), aff'd sub nom. *Bronken v. Morton*, 473 F.2d 790, 797-798 (9th Cir.), cert. denied, 414 U.S. 828 (1973). The same approach should control here.

We may assume that the Secretary would be abusing his discretion if he refused to classify as available sufficient lands to satisfy outstanding state indemnity rights. So, also, he might be faulted if he approved selections only when the lieu lands were less valuable than the lost sections. But the Secretary cannot be charged with any such questionable action. The rule he has adopted is simply to insist on rough equivalence, permitting the states to gain a modest advantage but not an unconscionable one in the course of selecting mineral lands to replace lost school lands of mineral character. Nor is there any suggestion that the Secretary's policy prevents the states with outstanding selection rights from fully satisfying those rights and exercising a meaningful choice among lands in the public domain.

B. The Secretary's "grossly disparate value" formula is not inconsistent with the 1958 amendments to Sections 2275 and 2276 of the Revised Statutes (43 U.S.C. 851 and 852), which for the first time authorized the states to make indemnity selections of

mineral land. To be sure, the amendments contemplate the selection of "mineral land" in lieu of other, lost, "mineral land," and they do not change the "equal in acreage" principle that has long characterized indemnity selections under the Revised Statutes. As the Department of the Interior acknowledged in its report to Congress on the legislative proposal that became the 1958 Act, "in making indemnity selections[,] lands are taken on an equal acreage basis \* \* \*." S. Rep. No. 1735, *supra*, at 8; H.R. Rep. No. 2347, *supra*, at 3. But the provisions of Sections 2275 and 2276 govern in-lieu selections only of "unappropriated" lands; lands that have been withdrawn or reserved may be selected only if the Secretary classifies them as proper for that purpose. Classification under Section 7 of the Taylor Grazing Act is thus a prerequisite to the application of the indemnity selection statute, and unless the Secretary's discretionary classification authority is meaningless, he cannot be bound to approve every selection that satisfies the criteria of Sections 2275 and 2276.

Moreover, the results produced by the Secretary's "disparate value" policy are fully in keeping with the intent of the Congress that enacted the 1958 amendments. Senator Watkins of Utah, a cosponsor of the measure, explained that, in granting school acreage to the states, "Congress specified the sections by number, to insure that the schools would be given a cross section of land value." 104 Cong. Rec. 11921 (1958). The prohibition against indemnity selection of mineral lands, Senator Watkins continued, par-



tially defeated the purpose of the school grants, because it prevented the states from obtaining the full cross-section to which they were entitled. The 1958 bill, he concluded, would "do[ ] nothing more than the Congress intended in the original grants under the respective enabling acts;" it would merely insure that the states receive "a fair cross section of land values." *Ibid.* In a similar vein, the House Committee reported that "[t]here appears to be little equity" in the restriction of indemnity selections to nonmineral lands, even where the lost school sections to be replaced were mineral. H.R. Rep. No. 2347, *supra*, at 2.

The Secretary's "grossly disparate value" policy thus helps to effectuate the congressional intent underlying the 1958 amendments. If states were permitted routinely to select mineral lands vastly more valuable than the school lands lost, the congressional purpose of guaranteeing a fair cross section of land values would not be served. As long as valuable mineral lands could be found in the public domain, states would receive a windfall for each section of low-value mineral school land appropriated before survey.

C. The classification rule applied to Utah in this case is not a novel deviation from previous practice. At least since 1965, the Department of the Interior has consistently followed a policy of refusing to classify as available for indemnity selection lands of

"grossly disparate value" to the lost acreage.<sup>26</sup> Nor is this a vague, undefined standard. The precise formula now employed was articulated in a memorandum approved by the Secretary of the Interior in January 1967 (A. 43-45). It states:

If the estimated value of the "selected lands" is more than \$100 per acre, then the values will not be considered grossly disparate if the value of the "selected lands" exceeds the value of the "base lands" by less than \$100 per acre or by 25% of the value of the "base land," whichever is greater.<sup>[27]</sup>

And, here also, the Department's practice has won congressional approval.<sup>28</sup> In January 1974, Senator

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<sup>26</sup> The record contains an internal Department of the Interior memorandum, dated September 14, 1962, which states (A. 41) that "[i]n considering an application by a state for indemnity selection \* \* \*, the disparity in values between the lands offered as base and the lands selected cannot be considered." The memorandum does not mention the Taylor Grazing Act or the Secretary's discretionary classification authority over withdrawn and grazing district land. It is doubtful whether the author of the memorandum, the Associate Solicitor of the Department's Division of Public Lands, accurately represented considered departmental policy even at the time the memorandum was written, but in any event no such policy has been in effect at any time since 1965.

<sup>27</sup> The formula does not exclude the exercise of discretion in appropriate cases. The memorandum further states:

If such estimate exceeds these limits, the case will be submitted to Washington for evaluation of all the circumstances.

<sup>28</sup> The court of appeals (Pet. App. 20a) points to an incident in 1966 in which the Department of the Interior allegedly "withdrew" a proposed amendment to Sections 2275 and 2276



Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, joined by Senator Metcalf, the Chairman of the Subcommittee on Minerals, Materials and Fuels, wrote the Secretary of the Interior concerning the prototype oil-shale leasing program and its relation to state indemnity selections. On behalf of the Committee, the Senators expressed concern about the very applications involved in this case and endorsed the Department's policy of barring selections of grossly disparate value:

There is one further complicating factor with respect to the Department's [oil-shale leasing]

that would have ended all dispute over the legitimacy of the Secretary's consideration of comparative land values in reviewing state indemnity selections. In fact, the Department's report to the Senate Committee on Interior and Insular Affairs stated "a preference for legislation which included [the 'equal value'] concept, but indicated no objection to the enactment of a bill without it." S. Rep. No. 1213, 89th Cong., 2d Sess. 4 (1966). The Committee responded (*id.* at 2):

The Department of the Interior \* \* \* indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leaseable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of [the bill under consideration], rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that public land issue.

Plainly, this statement manifests no disapproval of the "grossly disparate value" policy under the Taylor Grazing Act, a policy placed in written form by the Bureau of Land Management and approved by the Secretary several months after the Senate report.

program. That is the pending State indemnity selection applications filed by the State of Utah, for 157,000 acres of Federal land in Utah. We understand that these selections include the two Utah tracts the Department intends to lease as part of the prototype program.

We are well aware of the longstanding controversy over selection of "mineral-rich" lands by the States in satisfaction of their statehood grants. We agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a "gross disparity" of value between the lost lands and the selected lands. If you intend to change that policy, we request that you notify this Committee before opening any "mineral-rich" lands to selection.

In any event, it seems to us that the Department should decide the state selection question before going ahead with the prototype program. It is our understanding that if the State of Utah takes title to these oil shale lands, that it intends to offer them for development. Any large scale development on these lands would appear totally inconsistent with the objectives of the Department's prototype program.<sup>[29]</sup>

In sum, the Secretary's determination to consider comparable land values in reviewing state indemnity selections does not flout the congressional decision to permit selection of mineral lands in appropriate cir-

<sup>29</sup> *Oil Shale Leasing: Hearings on S. 2413 Before the Senate Subcomm. on Minerals, Materials and Fuels, 94th Cong., 2d Sess. 26 (1976).*

cumstances. Rather, insistence on rough value equivalence in lieu selections respects the legislative purpose of offering a fair replacement for lost grants, not an opportunity for profiteering. We may surmise that Congress left it to the Secretary to prevent abuses within the very wide limits left by the acre-for-acre and mineral-for-mineral guidelines. Certainly, the "grossly disparate value" policy is well within the discretion conferred by Section 7 of the Taylor Grazing Act. The courts below have misread the controlling provisions and failed to accord the weight due to well-established administrative practice, known to the Congress and expressly endorsed.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1979

#### APPENDIX

#### STATUTES INVOLVED

##### 1. *Utah Enabling Act*

Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109:

That upon the admission of said State [of Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reser-



vation shall have been extinguished and such lands be restored to and become a part of the public domain.

## 2. *School Indemnity Selection Statutes*

Sections 2275 and 2276 of the Revised Statutes, as restated and revised by Sections 1 and 2 of Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928-929, and as thereafter amended, 43 U.S.C. 851-852:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes [43 U.S.C. 852], by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section [2276 of the Revised Statutes], by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in

lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section [2276 of the Revised Statutes], by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

SEC. 2276. (a) The lands appropriated by section 2275 of the Revised Statutes [43 U.S.C. 851], shall be selected from any unappropriated, surveyed or unsurveyed public lands within the



State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands, mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided,*

*however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit

as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of [the Act of September 27, 1944 (58 Stat. 748), as amended (43 U.S.C., sec. 282)] on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which

it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than [the said Act of September 27, 1944], or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d) (1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purpose of this section of the mineral character of lands lost to a State ~~shall~~ be made as of the date of application for selection and upon the basis of the best evidence available at that time.



### 3. *Taylor Grazing Act*

Section 1 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, as amended, 43 U.S.C. 315:

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage corps: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this subchapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters

within its jurisdiction. Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this subchapter nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of title 16, for the purposes set forth in section 475 of title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts



from all forms of entry of settlement. Nothing in this subchapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

Section 7 of the Act, 48 Stat. 1272, as amended by the Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f:

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws including the Act

of February 25, 1920, as amended [30 U.S.C. 181 et seq.], may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

**In the Supreme Court of the  
United States**

OCTOBER TERM, 1978

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No. 78-1522

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CECIL D. ANDRUS, SECRETARY OF  
THE INTERIOR,

*Petitioner,*

v.

STATE OF UTAH,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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BRIEF BY RESPONDENT STATE OF UTAH

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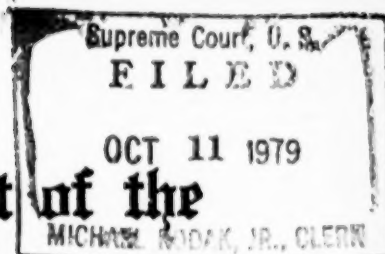
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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
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---

BRIEF BY RESPONDENT STATE OF UTAH

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## INTRODUCTION

Approximately fifteen years ago, the State of Utah began selecting certain lands believed to contain oil shale deposits, as indemnity for school land grants in place (base lands) which the State never received because of federal pre-emption or private entry prior to

the time that title otherwise would have passed to the State.<sup>1</sup>

The Secretary of the Interior has not yet determined whether these school indemnity selections are in compliance with the criteria of the school indemnity selection statute (43 U.S.C. §852), but has declared that he will reject these selections if in his opinion the selected lands are substantially more valuable than the base lands—even though such conduct would be clearly contrary to Utah's Enabling Act and to the school indemnity statute, which require that lands selected must be of equal acreage to the lost base lands for which selection is made. The Secretary argues that Section 7 of the Taylor Grazing Act (43 U.S.C. §315f) authorizes him to so circumvent the school indemnity selection statute.<sup>2</sup> The trial court and the court below rejected that argument.

<sup>1</sup> The Ute Indian Tribe filed a Motion for leave to intervene or, in the alternative, to file a Brief amicus curiae in this case. The Secretary of the Interior filed a Memorandum in response to that Motion, fully and effectively demonstrating that there is no basis or justification for the Tribe either to intervene or appear as amicus curiae. The State of Utah endorses and adopts the Memorandum filed by the Secretary of the Interior, except to the extent that the Secretary claims in that Memorandum that he has authority to classify school indemnity selections pursuant to the Taylor Grazing Act.

The pertinent point is that whatever interests the Ute Indian Tribe may have in a determination of the present exterior boundaries, if any, of the Uncompahgre Indian Reservation is now in litigation in the Federal District Court in Utah, and will in no way be prejudiced by this action now pending before this Court. If the Tribe feels aggrieved by any future judicial determination of any federal question concerning the original Uncompahgre Indian Reservation it will have an opportunity in due course to request this Court to review any such determination. But that time has not come.

<sup>2</sup> In this Brief, the State of Utah is frequently critical of various legal positions asserted by the Secretary of the Interior. It is only fair to say, however, that the Secretary of the Interior did not request certiorari in this case. He evaluated the potential impact of out-

Utah concurs in the statements by the Secretary with respect to "Jurisdiction" and "Statutes Involved" (pp. 1-2 of the Secretary's Brief), but believes that the "Questions Presented" make inaccurate assumptions. For example, the Secretary assumes in Question No. 1 (p. 2 of Secretary's Brief) that lands included within grazing districts are "withdrawn from all forms of private appropriation." This is not true, since the Taylor Grazing Act expressly exempts mining entries and appropriations (43 U.S.C. §315f). Further, it is inaccurate to assume that school indemnity selections by a State for the support of public schools are "private appropriations" of public lands.

The real question in this case is whether Congress has conferred on the States the *right to select* unappropriated federal mineral land as indemnity for lost mineral school sections in place, or whether Congress has given the Secretary of Interior unbridled discretion to approve or reject such selections for whatever reasons he deems appropriate. Utah contends that this Court has clearly held that the right of selection is in the States, and that the Secretary has no discretionary authority beyond that of making an administrative adjudication to determine whether the selections are in accordance with the criteria set forth in the school indemnity selection statute (43 U.S.C. §852).

<sup>2</sup> **Continued**

standing school indemnity selection rights, as held by the seven States still having such rights, on federal management of the public domain, and was content to live with and abide by the decision of the lower court. He therefore notified the Justice Department that he did not desire any petition for certiorari, but he was overruled by the Justice Department.



Referring to *Wyoming v. United States*, 255 U.S. 489 (1921), and *Payne v. New Mexico*, 225 U.S. 367 (1921), the lower court concluded "... we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah." (586 F.2d 756, 769).

### SUMMARY OF ARGUMENT

Federal land grants to the States for the support of the common schools create a solemn public trust of critical importance for the support of public schools. This trust is in the nature of a bilateral compact whereby Utah, as a sovereign State admitted into the Union on an equal footing with the Original States, agreed not to tax federal lands within Utah, and whereby the United States, for its part, granted four sections of federal lands within each township to Utah for the aid and support of the public schools, thus compensating Utah for the limited and reduced property tax base available to raise revenues to support governmental functions (specifically, the operation and maintenance of the public school system).

By clear and unambiguous legislation, Congress not only granted and appropriated lands for the original school sections in place, but further provided that whenever title to any such school section did not pass to Utah because of federal pre-emption or private entry prior to survey, Utah could select, at its option, an equal acreage of unappropriated federal lands (28 Stat. 109 §6; 43 U.S.C. §852). The congressional grant was

in the nature of an offer which Utah could accept or exercise at its election and discretion; and, when so exercised through the filing of school indemnity selection lists, the Secretary of the Interior is obligated by law to conduct an administrative adjudication to determine whether such indemnity selections are in compliance with the enabling act and the statutory criteria set forth by Congress in 43 U.S.C. §852.

If there is such compliance, Utah receives equitable title to the selected lands as of the date that the respective indemnity selection lists were filed, and the Secretary must approve such selections by issuing what is commonly referred to as a "clear list," and legal title thereupon vests in Utah.<sup>3</sup> If the selection lists are not in compliance with the applicable statutory criteria, equitable title does not vest in the State by virtue of filing such selections, and the Secretary is obligated to reject such selections.

<sup>3</sup> The Secretary repeatedly claims in his Brief that he has unlimited discretion to approve or reject school indemnity selections. Such a view implies that if he approves a school indemnity selection, that he then would issue some deed or other document with words of conveyance in order to transfer title to the State. But that is not the case. Title passes directly by virtue of the appropriation and commitment made in the Enabling Acts and by virtue of the grant and appropriation made in 43 U.S.C. §§851-852.

The Secretary merely issues a "clear list" after he completes his ministerial adjudication, and this is no more than an acknowledgment that the statutory criteria of 43 U.S.C. §852 have been satisfied by the school indemnity selection identified in the clear list. As this Court held in *Wyoming v. United States*, supra, equitable title to the land selected vests in the State at the date of selection, and the "clear list" has the effect of perfecting fee title in the State. (See 43 U.S.C. §859). Clear lists never contain any language purporting to convey or grant title, as would a patent or other instrument of conveyance. The Secretary never has, and does not now, issue "patents"—he merely certifies by a clear list. By contrast, the Secretary must issue patents when state lands are exchanged for federal lands. 43 U.S.C. §315g(3).

The Secretary of the Interior has no authority to substitute a comparative value criterion in lieu of the equal acreage criterion mandated by Congress. Nor does he have separate and independent authority under Section 7f of the Taylor Grazing Act, 43 U.S.C. 315f, to "classify" all lands within a grazing district to determine whether they are "proper" for school indemnity selections, a process whereby he claims he may consider a wide range of public interest factors, including the comparative values of the base school lands and the selected indemnity lands, and "classify" the land for retention in federal ownership if in his personal view he does not think the public interest would be served by allowing title to pass to the State.

Even if it be assumed, *arguendo*, that the Secretary has authority to classify the suitability of land for school indemnity selection, the classification criteria would be those set forth in 43 U.S.C. §852, and would not include a comparative value criterion.

The court below held that the Secretary's arguments were based on a strained and wholly irrational construction of a 1936 Amendment to the Taylor Grazing Act and Executive Order No. 6910 as his claimed source of authority for frustrating the clear mandate of Congress under the school indemnity selection statute, and concluded there is absolutely no indication in the legislative history of the Taylor Grazing Act, or in the Act itself, that Congress intended to require or authorize "classification" under Section 7 as a condition to a State's exercise of its school indemnity selection rights.

The court also noted that this Court has clearly held that school indemnity selection rights are to be exercised in the discretion of the States—not the Secretary of the Interior. By contrast, the Secretary cited no case in any jurisdiction that has ever held that the classification procedures of the Taylor Grazing Act apply to school indemnity selections; and the Secretary has also admitted that he previously had always recognized that school indemnity selections must be on an acre-for-acre basis and that he had *never* applied the "comparative value" criterion to school indemnity selections.<sup>4</sup>

The court below also noted that this Court held in *Wyoming v. United States*, *supra*, that the very act of filing the school indemnity selection lists operates as a release, waiver and relinquishment by the State of any further claim to the original school sections in place, and the State receives in lieu thereof equitable title to the selected lands. This is a form of equitable conversion, because the filing of the selection lists results in a simultaneous payment in full to the United States for the selected lands, and no other or further act is required by the State to complete the transaction. The only remaining act is the administrative adjudication to be conducted by the Secretary of the Interior.

## ARGUMENT

### I. SCHOOL LAND GRANTS DERIVE FROM

<sup>4</sup> To keep this case in perspective, it is important to realize that the oil shale reserves covered by Utah's school indemnity selections in this case constitute only a fraction of one percent of the oil shale reserves located in the "Three Corners" region. See Section VI.C of this Brief.



## A BILATERAL COMPACT AND CREATE A SOLEMN PUBLIC TRUST

### A. *Public Trust Nature of School Land Grants*

#### 1. *Introduction*

The Secretary views indemnity selections for school land grants in place as a congressional authorization for him to decide—based on his personal notions of public policy—when, whether and to what extent such selections should be approved. This is a mistaken view. Unlike most federal land grants, school land grants are made in trust to create a permanent fund for the support of the public school system of the State. This trust is extremely important and involves fundamental concepts of equal footing, sovereign governmental functions, and bilateral compact between sovereigns. Since the Secretary seeks to emasculate this public trust though his personal notions of public policy, it seems important to quote part of the lower court's summary of the nature of this trust:

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories.

The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. *It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states.* The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.

Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. *State of Nebraska v. Platte*



Valley Power and Irr. Dist., 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands. The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of pre-existing rights of others. *McCreedy v. Haskell*, 119 U.S. 327 (1886). (586 F.2d 756, 758; Emphasis in Opinion).

## 2. Equal Footing

States admitted into the Union are accorded equal footing with the Original States, and the respective enabling acts so provide. The status of equal footing is not merely a matter of congressional grace, but is a fundamental constitutional requirement. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Utah*, 283 U.S. 64 (1931).

The requirements of "equal footing" extend beyond equality in sovereign power and regulatory authority, and include a measure of state-owned property rights (see *Smith v. Maryland*, 18 How. 71 (1855); and *United States v. Texas*, 339 U.S. 707 (1950)). Of course, this does not mean that each State must have an equal area or equal value in property, but merely that each State shall be accorded equivalent treatment under consistent and uniform principles.

In *United States v. Morrison*, 240 U.S. 192, 205 (1916), this Court considered a school land grant to Nevada, and emphasized that all school land grants should be considered on an equal footing. To the same effect is *Heydenfelt v. Daney Gold & Silver Min. Co.*, 93 U.S. 634, 638 (1876).

As the lower court observed, with respect to revenues to support public schools, equal footing is achieved by a congressional grant designed to produce a fair and just settlement with the newly-admitted State in lieu of immunity from taxation of federal lands within the State, and by acceptance of the grant and the attendant trust restrictions by the State. It is this bilateral compact that "liquidates" the State's entitlement to public lands in lieu of taxing federal lands, and it is thus the bilateral arrangement with the public land States that satisfies the requirements of constitutional equal footing.

## 3. Bilateral Compact

The Public Land Law Review Commission noted the bilateral nature of the federal school land grant program:

Commencing with Ohio, the traditional requirement has been that the new public land states must adopt an "irrevocable ordinance" preliminary to admission to the Union in which they recognize the property rights of the United States in the public lands, and that all Federal property shall be immune from state taxation. In addition, the states have agreed not to tax transferees of Federal lands for a stated period and to tax non-resident ownerships the same as those of residents.

In this sense, public land grants to states have not been strictly unilateral bounties, but rather important elements of bilateral compacts. (*One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. 244 (1970)).

The foregoing quotation is bottomed on sound judicial authority.<sup>5</sup> In *Cooper v. Roberts*, 18 How. 173

<sup>5</sup> In *Stearns v. Minnesota*, 179 U.S. 223 (1900), this Court explained why bilateral compacts between a State and the United States are valid so long as they relate to property rights and interests and do not affect sovereign equal footing with the other States:

When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other States, there was within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857, 11 Stat. 166, authorizing the inhabitants of Minnesota to form a constitution and a state government tendered certain propositions to the people of the Territory, . . . (That the State by a clause in its constitution shall never interfere with the disposal of the soil by the United States, etc.) . . . .

That these provisions of the enabling act and the Constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of states but only of the power of a State to deal with the nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the nation.

That a State and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history. (179 U.S. at 243-245).

(1855), the Court characterized a school land grant to Michigan as a "compact" between Michigan and the United States. And, in *United States v. Aikins*, 84 F.Supp. 260, 266 (1949), *aff'd. sub. nom.* 183 F.2d 192 (9th Circ. 1950), the court reviewed a considerable number of cases, and concluded that railroad grants should be strictly construed, but that school land grants should be liberally construed because such grants:

. . . are grants from one sovereign, the United States, to another sovereign, the State, for public, and not private purposes of profit, and are not subject to such narrow construction.

#### 4. *Perpetuity and Solemnity of Trust*

This Court underscored the solemnity of the school trust obligation in 1967 when it decided *Lassen v. Arizona*, 385 U.S. 458 (1967). In that case the Land Commissioner of Arizona assumed that he could grant rights-of-way and material sites on school trust lands to the Arizona Highway Department without cash compensation to the school trust fund, if the highway would enhance the value of the adjoining school lands by a measure equaling or exceeding the value of the rights-of-way and material sites granted. The Court held that the nature of the federal trust as created by the school land grants to the State prevented such action, and said that:

. . . Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands. (385 U.S. at 469).

The Court further explained that:

The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly made clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms. We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands. (385 U.S. at 460-61).<sup>6</sup>

The importance of this public trust has never been questioned by the courts. See *Alamo Land & Cattle Co., Inc., v. State of Arizona*, 424 U.S. 295 (1976).

5. *Utah Enabling Act: Congressional Conditions for Creation of the Public Trust for Public Schools*

The Utah Enabling Act was passed by Congress as the Act of July 16, 1894, 28 Stat. 107, and was entitled:

An Act To enable the people of Utah to form a constitution and State government, and to be ad-

<sup>6</sup> In *Lassen v. Arizona*, *supra*, this Court admonished the United States Attorney General "to maintain whatever proceedings may be necessary" to protect the integrity of the school trust grant to Arizona. Here, the Solicitor General asks this Court to cripple and diminish the school trust grant to Utah.

mitted into the Union on an equal footing with the original States.

With respect to the immunity of federal lands from taxation by the State, Section 3 of the Enabling Act authorized a convention to be convened for the purpose of forming a constitution and state government, requiring that:

. . . said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State . . . that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use . . . .

Section 3 of the Enabling Act then proceeded to require the State of Utah, prior to statehood, to adopt an "ordinance irrevocable" for:

. . . the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Section 6 of the Enabling Act then provided:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress



*other lands equivalent thereto . . . are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of Interior . . . . (Emphasis added).*

Section 10 of the Enabling Act then imposed the specific conditions on the use and disposition of the school land grant contained in Section 6:

*. . . the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . . .*

#### 6. *Utah Constitution: Acceptance of the Public Trust*

Utah accepted the conditions and obligations of the federal grant to create a trust in aid and support of the public schools by providing in Section 3, Article X, of the Utah Constitution that such school lands and all proceeds derived therefrom:

*. . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only shall be expended for the support of the common schools.*

Section 7, Article X, of the Utah Constitution further provided that:

*All public school funds shall be guaranteed by the State against loss or diversion.*

Thus, the public trust for the support of Utah's public school system was created by the grant and at-

tendant conditions established by Congress in the Utah Enabling Act and the acceptance by Utah through the adoption of its Constitution.

#### 7. *Summary*

The lower court repeatedly emphasized the special and substantial features of the school land grant trust. For example:

*The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. (586 F.2d at 766).*

Further, the lower court deemed it important to emphasize and quote in full the trial court's Conclusion of Law No. 3:

*Conclusion No. 3: Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and*

adopted by the people of the State of Utah. (586 F.2d at 764).

With the foregoing background, it becomes easier to appreciate the unique significance of school trust land grants, and the importance that this Court has placed on school indemnity selections.

## II. SCHOOL INDEMNITY SELECTIONS MUST BE ON THE BASIS OF EQUAL ACREAGE RATHER THAN EQUAL VALUE

### A. Preface

It is abundantly clear that the Secretary of the Interior desires to reject Utah's school indemnity selections by implementing a "comparative value" test, and endeavors to justify such action under "classification" authority allegedly derived from Section 7 of the Taylor Grazing Act, and necessitated by an alleged withdrawal of lands under Executive Order No. 6910. This controversy came into focus when Tracts U-a and U-b in Utah were leased for oil shale development in 1974 as part of a federal prototype oil shale leasing program, resulting in a combined "lease bonus" bid of approximately \$120 million, with 20% of the bonus to be paid in cash each year for the first three years and the last two "payments" to be credited against development costs incurred by the lessees.<sup>7</sup>

<sup>7</sup> It seems only fair to point out that Utah has been more than cooperative in meeting with representatives of the Department of Interior to identify lands for school indemnity selection that would permit effective land management by both the State and the Department of the Interior. In fact, the Department recommended the areas selected by the State. It also seems appropriate to point out why Utah waited nearly ten years after filing its first selections

Prior to publishing notice for competitive bidding on the prototype tracts, the Secretary of Interior—aware that the proposed prototype tracts had previously been selected by Utah as school indemnity lands, and also aware that Utah claimed equitable title to such lands—requested the Governor of Utah to enter into an agreement with the United States whereby Utah would consent to the issuance of leases by the Secretary, and, if Utah prevailed in its claim to equitable title, Utah would accept the leases as lessor and would honor the terms of the leases. Such an agreement was executed. (R., Vol. III, pp. 73-74).

### <sup>7</sup> Continued

before bringing this lawsuit. These two matters were clearly explained in the affidavit of Charles R. Hansen, Director of the Utah Division of State Lands, filed in support of Utah's motion for summary judgment—and not controverted in any way by the Secretary of Interior. This affidavit was part of the record before the Tenth Circuit Court, and its pertinent parts are as follows:

CHARLES R. HANSEN, first being duly sworn upon oath, deposes and says that he is the Director of the Division of State Lands of the State of Utah, and that:

1. During numerous meetings between 1966 and 1974 between representatives of the Utah Division of State Lands and representatives of the office of the State Director of the Bureau of and Management, held to discuss the adequacy and status of Utah's oil shale selections as indemnity for lost school lands (which are the subject of the present litigation), Utah was advised that there was no objection or question on the part of the Federal Government with respect to whether such selections were in compliance with all statutory and regulatory requirements pertaining thereto, with the exception of the advisability of the State of Utah making selections which would constitute "manageable blocks" of land, and in this regard Utah did thereafter file such selections in such a manner as to satisfy all suggestions offered by the Bureau of and Management. The final suggestions by the Bureau in this regard were explained in a meeting held December 19, 1968, attended by myself and members of my staff as representatives of the State of Utah and by Mr. Robert D. Nielsen, as the State Director of the Bureau of Land Management, and members of his staff as representatives of the Bureau of Land Management. The suggestions

In view of the fact that Utah's Enabling Act and the school indemnification grant contained in 43 U.S.C. §851 require school indemnity selections to be made on the basis of equal acreage, it is interesting to examine the evolution of the Secretary's argument for a comparative value criterion. The Secretary claims that the "comparable value" test derived from a policy established by his predecessor Secretary Stewart L. Udall on January 18, 1967,<sup>8</sup> and that the policy has "won congressional approval." (Secretary's Brief, p. 61). Nothing could be farther from the truth, as will be seen below.

<sup>7</sup> Continued

offered by the Bureau were formally approved by the Utah Board of State Lands on January 15, 1969, and in compliance therewith Utah subsequently prepared and filed the selection lists dated December 19, 1969, (25,583.20 acres), February 17, 1970 (38,058.81 acres), November 8, 1971 (11,044.87 acres), November 15, 1971 (11,977.49 acres), and November 19, 1971 (12,216.59 acres), and this brought the total pending state selections on oil shale lands to 157,255.90 acres.

2. On numerous occasions I have discussed the status of these pending applications with appropriate representatives of the Federal Government, including discussions with Harrison Loesch, former Assistant Secretary of Interior, and with Reid Stone, Federal Oil Shale Coordinator, and on each occasion I was advised that federal action on the State selections was awaiting development of the Federal proto-type program for oil shale leasing, and that as soon as that program was developed to the point that the Federal Government was ready to issue the original leases, they believed that the selection lists as filed by Utah would be approved and clear lists issued. It was not until February 14, 1974, that Secretary Rogers Morton formally advised Governor Calvin Rampton that the Department of Interior intended to apply a comparative value test to determine whether the oil shale lands selected had substantially more value than the base lands for which selection was made.

<sup>8</sup> At page 15 of his Brief, the Secretary says that he "has adhered steadily to the 'grossly disparate value' policy since at least 1965, . . ." This is difficult to fathom, since the Udall Memorandum—the father of that so-called policy—did not come into existence until two years later.

*B. The "Udall Memorandum" on Comparative Value*

The origin of the comparative value test is somewhat curious. On December 15, 1966, the Director of the Bureau of Land Management sent an intradepartmental memorandum to the Secretary of Interior through the Assistant Secretary for Public Land Management. This memorandum raised questions as to the comparative values of base lands and selected lands, and proposed certain value criteria to be met before indemnity selections received approval, and concluded by stating:

Your approval of this memorandum will constitute your approval of the suggested guidelines.

At the end of the memorandum a space was provided for the signature of the Secretary, and it apparently was signed on January 18, 1967, by Stewart L. Udall, then the Secretary of the Interior (R., Vol. III, pp. 49-51). While the guidelines contained within the memorandum have never been implemented in connection with any school indemnity selections, even though the memorandum is more than twelve years old, it has become the sole source of the Secretary's "policy" for employing such a comparative value test.

It seems that the Udall Memorandum was buried somewhere in Department of Interior files for more than seven years. It was the best kept secret in Washington. Apparently it was never published in the Federal Register, was not the subject of any rule-making procedures, and was not implemented by any regulations published in the Code of Federal Regulations. It apparently has



never to this day been utilized in any so-called "classification" of school indemnity selections. It is particularly interesting that, as recently as 1976, the Interior Department's own Board of Land Appeals was not aware of, and could not find, the Udall Memorandum. See *State of New Mexico*, IBLA 75-582, 24 IBLA 135, 137 (March 8, 1976).

And, equally interesting, is the fact that more than five years after the Udall Memorandum allegedly became official Department "policy," Secretary of Interior Rogers Morton was not aware of its existence. On May 23, 1972, Secretary Morton wrote to Utah's Governor Calvin L. Rampton concerning the very school indemnity selections now in dispute, and assured Utah that to the extent the matter was within his discretion he would approve Utah's selections, and would disapprove them only if there was some legal "barrier" which prohibited approval:

The opinion of the Attorney General has been requested concerning the filings for selection of mineral lands by the State of Utah. The Attorney General has been asked whether there is any legal barrier to the approval of the filed selections of the State of Utah and what point in time the rights of the State vest, i.e., at the time of filing for selection or at the time of approval of such selections.

...

... *If the Attorney General finds that there is no legal barrier to the approval of the State selection, then this Department will initiate the administrative steps necessary to accomplish that approval.*

*With this information and assurances at your disposal, will you withdraw any objection to the proposed leasing of two tracts of land in Utah for oil shale development? (Emphasis added; R., Vol. III, p. 68).<sup>9</sup>*

If Secretary Morton had been aware of any "comparative value" policy that would have given him discretion to reject the selections, he surely would have mentioned it when he gave Utah his "assurances" that he would initiate the necessary administrative steps to accomplish approval of the indemnity selections.

In any event, Utah was never advised as to when, if ever, the Secretary received the requested opinion from the United States Attorney General. If such an opinion was prepared, it has never been made public.

It was not until February 14, 1974—more than seven years after the Udall Memorandum was signed—that the "comparative value" policy first saw the light of day. On that date, Secretary Morton wrote a further letter to Governor Rampton concerning Utah's school indemnity selections. Utah was startled to learn of the "comparative value" policy, as explained by Secretary Morton:

As you know, the Department of the Interior has not as yet acted upon the State's applications. The principal question presented by the applica-

<sup>9</sup> If the Secretary really believed that he was authorized or required to "classify" school indemnity selections under Section 7 of the Taylor Grazing Act, he certainly would have mentioned that fact to Governor Rampton in his May 23, 1972 letter; and he certainly would not have asked the United States Attorney General if "the rights of the State vests" at the date of selection.

tions is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. §315f (1974), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate to advise you that we will apply the above-mentioned policy in that adjudication. (R., Vol. III, p. 70).

It is perhaps revealing that the Secretary now characterizes the February 14, 1974 letter as an "announcement" of the Udall Memorandum. (Secretary's Petition, p. 5). Utah initiated this litigation less than three weeks after receipt of Secretary Morton's February 14th letter.

It seems significant that the Secretary has never explained how comparative values would be determined. Any appraisal of values under the Taylor Grazing Act would be conducted by the Bureau of Land Management, and could consider surface estate values only, since mineral deposits are within the jurisdiction of the

United States Geological Survey under 43 U.S.C. §31(a). Moreover, mineral deposits cannot be evaluated by a "walk-on" inspection, but would require extensive drilling and blocking, at a cost of untold millions of dollars. There is no evidence that the Secretary has ever requested Congress to fund such a program. Indeed, the lower court was most skeptical as to whether the Secretary even had an established "policy" that could be implemented in any effective way:

At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are non-existent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. (586 F.2d 760).

Aside from the very dubious nature and status of the Udall Memorandum as an administrative tool, it is important to emphasize that the "policy" embraced in that Memorandum is clearly contrary to law and has been expressly rejected by Congress.

First, 43 U.S.C. §851 expressly grants and appropriates "other lands of equal acreage" as indemnification for lost school lands. The Udall Memorandum would reverse this congressional grant, and by an illegal administrative fiat amend the statute to read "other lands of equal value" are appropriated to satisfy school indemnity rights.

Furthermore, Congress has provided its own measure of fair value in indemnity selections by authorizing States to select mineral lands *only* when the lost school lands are also mineral in character. If Congress had intended to authorize the Secretary to employ an additional value criterion, it would have expressly done so, as it did in Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), wherein the Secretary is authorized to utilize either equal acreage or equal value as the basis for approving *exchanges* of state land for federal land.

As indicated earlier, the Secretary has never applied a comparative value criterion in acting on any prior school indemnity selections. The Secretary claims as his source of authority for the Udall Memorandum the 1936 Amendment to the Taylor Grazing Act, and so he claims to believe that he has had this authority for more than forty years—and yet he has never used it. Prior school indemnity selections, as filed by Utah and other States, have never been subjected to such a comparative value test. But now, for the first time, the Secretary desires to initiate this practice to deny Utah's school indemnity selections.

And it is of substantial significance that the Secretary has repeatedly asked Congress for authority to employ a comparative value test when determining whether school indemnity selections are in accordance with congressional requirements. Congress has steadfastly refused to grant the Secretary such authority. Early in 1963, Congressman Wayne Aspinall (D.Colo.) introduced H.R. 16, which would have provided that school

indemnity selection of mineral-rich land would be authorized only when the lost lands were of equal value. If the bill had passed there would have been a question as to whether it was unconstitutional as a unilateral amendment of a bilateral compact between sovereigns, but the bill was tabled. And that was that!

Then, in 1966, when H. R. 5984 was introduced to amend 43 U.S.C. §852 by allowing States to select unsurveyed lands as indemnification for lost school lands, the Department of Interior sought to have the bill amended to require equal value rather than equal acreage for school indemnity selections. In rejecting any such amendment, the Senate Committee on Interior & Insular Affairs noted:

The Department of the Interior, in its report which is included below, indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leasable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of H.R. 5984, rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that public land issue. (Senate Report No. 1213, 89th Cong., Second Sess., 1966, at p.2).

So, without the Department's requested "equal value" amendment, H.R. 5984 was duly enacted into



law as the Act of June 26, 1966, PL 89-470, 80 Stat. 220, amending 43 U.S.C. §852.

The Department of Interior's change of position in registering "no objection" to enactment of PL 89-470 without the Department's previously requested amendment to provide "an equal value concept" drew the attention of the lower court:

Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (*United States v. Union Pacific Railroad Company*, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. (*State of Wyoming v. United States*, 255 U.S. 489 (1921)). We deem this to be particularly significant in recognition that the sole specific Congressional reference in §852(a) (1), *supra*, relates to lands "... mineral in character may be selected by a State [if] ... the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; ...". No reference whatsoever is made to the *value* of the "minerals in character." *This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing "acre for acre" selection basis.* U.S. Code, Cong. & Ad. News, 2nd Session, Volume

II, p. 2324 (1966). (586 F.2d 761; Emphasis added).<sup>10</sup>

Congress was directly confronted with the "equal acreage" rather than "comparative value" basis for school indemnity selections on other occasions. In 1958 the House Committee on Interior and Insular Affairs carefully considered the matter in connection with S. 2517, which became an amendment to 43 U.S.C. §852. The Committee concluded that the federal interest was adequately protected by the equal acreage criterion:

*The Federal interest is amply protected by S. 2517. Mineral lands may be selected as indemnity lands only for other mineral lands. Lands on a known geologic structure of an oil and gas field may be selected as indemnity only for lands similarly situated. And lands subject to mineral lease or permit may be selected only if all lands subject to the lease or permit are chosen and only if none of the lands is in a producing or producible status. The character of the lands for which indemnity is sought will be determined as of the date of application for selection.* (1958 U.S. Code Cong. and Adm. News, p. 3964; Emphasis added).

And, at that time, the Department of Interior submitted a report to Congress that clearly recognized the right of the States to select school indemnity lands of equal acreage, as distinguished from various exchanges under other laws where equal value was the measure of the exchange:

<sup>10</sup> It was in December 1966—the very year that Congress rejected (and the Department withdrew its request for) an equal value criterion—that officials in the Department of Interior apparently drafted the "Udall Memorandum," approved by Secretary Udall the following January.

Under other statutes a State . . . may exchange . . . lands of equal value, but, naturally, a State would prefer to use lands of little value as base for indemnity selections rather than for exchanges. The reason for this is that in making indemnity selections lands are taken on a equal acreage basis, but under the Taylor Grazing Act, as amended, (43 U.S.C., sec. 315 et seq.), and the Forest Exchange Act, as amended, (16 U.S.C., secs. 485-486), exchanges are on a basis of equal value.

The direction in which self-interest would lead a State in such a situation is obvious. Any objection to permitting a State to select lands on a basis of equal acreage would be greatly increased if it were to be permitted to select mineral lands in lieu of non-mineral lands which had been lost. In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965).<sup>11</sup>

Of course, the 1958 Amendment to 43 U.S.C. §852 did not, and had never purported to, authorize the States to select mineral lands as indemnity for lost non-mineral lands. The requirements for mineral selection were as explained by the House Committee on Interior and Insular Affairs, quoted above.

In view of the clear and repeated insistence by

<sup>11</sup> The Department thus makes it absolutely clear in this 1958 report not only that school indemnity selections must be on the basis of equal acreage rather than equal value, but, perhaps more important, that such selections have nothing at all to do with the Taylor Grazing Act.

Congress that school indemnity selections be on the basis of equal acreage, it is difficult to see how the Secretary can now represent to this Court that the policy of the Udall memorandum, though never implemented, is a "practice" that has "won congressional approval." (Secretary's Brief, p. 61). The whole basis for such a representation is an alleged letter—not in the record—written in January of 1974 by two Senators to the Secretary of the Interior, apparently referring to the Udall Memorandum, and declaring that "we agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a 'gross disparity' of value between the lost lands and the selected lands." This letter apparently was written one month before that "policy" was "announced" to Utah in Secretary Morton's letter to Governor Rampton on February 14, 1974. Apparently the two Senators were not too familiar with the Udall policy, since they thought it was promulgated in 1965, rather than in 1967.

More to the point, however, is the fact that the Secretary relies on the 1936 Amendment to the Taylor Grazing Act as his sole source of authority for promulgation of the Udall Memorandum, and the further fact that the Secretary relies solely on a letter written by two Senators thirty-eight years after that statute was enacted, to show that the Udall Memorandum is a "practice" that has "won congressional approval." That argument is nothing short of absurd.

The Secretary's present position in support of an equal value criterion is entirely inconsistent with every-

thing that has gone on previously, both before and after the 1936 Amendment to the Taylor Grazing Act. The cases and departmental decisions were entirely clear and consistent in recognizing equal acreage, rather than equal value, as the measure for indemnity selections. See *Mullan v. United States*, 118 U.S. 271 (1886); *California v. Deseret Water Company*, 243 U.S. 415 (1917); *United States v. Morrison*, 240 U.S. 192 (1916); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Wyoming v. United States*, 255 U.S. 489 (1921); and 52 I.D. 273 (February 1, 1928). The same result has obtained since the 1936 Amendment: see *State of California*, 67 I.D. 85 (February 29, 1960); and 43 C.F.R. 2621.0-3.

Of particular significance is the fact that on September 14, 1962, Thomas J. Cavanaugh, Associate Solicitor for Public Lands, advised the Director of the Bureau of Land Management with respect to the legality of considering disparity of values in school indemnity selections. Associate Solicitor Cavanaugh, it will be noted, commented on both the 1958 Amendment to 43 U.S.C. §852 and the Department's report thereon. And his opinion was firm and conclusive:

In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered . . . .

When the state lieu selection statutes were last amended in 1958, it was clear that Congress recognized the practice by the states of offering as

base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law . . . . Accordingly, it is clear that the 1958 amendments to the state indemnity selection laws not only reaffirmed the position of this Department that discrepancies in values between offered and selected lands was not to be considered, but also intended the equal acreage rather than equal value test be carried forward in the case of mineral lands. Therefore, the mere fact that the mineral value of the selected lands far exceeds that of the offered lands may not operate as a bar to the selection. (R., Vol. III, pp. 42-43).

What more need be said?

### III. THE STATES HAVE THE RIGHT TO DECIDE WHICH UNAPPROPRIATED PUBLIC LANDS SHALL BE SELECTED

#### A. Preface

It will be recalled that, by virtue of Section 6 of the Utah Enabling Act, Congress not only granted to Utah four sections within each township for the support of the common schools, but further granted other lands "equivalent thereto" in lieu of any school lands originally granted to, but not received by, Utah. In addition to this specific indemnity grant to Utah, 43 U.S.C. §851 contains a basic indemnity grant and appropriation to all public land States entitled to school indemnity selections. So far as pertinent here, the relevant language provides that when original school grants



in place do not pass to the States because of federal pre-emption or private entry prior to survey, then:

. . . other lands of *equal acreage* are hereby *appropriated and granted*, and may be selected in accordance with the provisions of section 852 of this title, by said State, . . . . (43 U.S.C. §851; Emphasis added).

Section 43 U.S.C. 852(a) provides that:

The lands appropriated by section 851 of this title shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State . . . .

The Secretary's strained and irrational construction of Section 7 of the Taylor Grazing Act would seize upon one single word—"proper"—and seek to use that word as the springboard by which he could use his discretion, and deprive the States of their discretion, in determining which indemnity lands could be selected. Indeed, as noted above, Section 851 declares that indemnity lands "may be selected, in accordance with the provisions of Section 852 of this title, *by said State*, in lieu of such as may be thus taken by pre-emption or homestead settlers" (Emphasis added).

And in 1966, when Congress amended Section 852 to allow States to select unsurveyed lands, and also to select lands as indemnity for lands lost after survey but before creation of the State, the Senate Interior & Insular Affairs Committee underscored and reaffirmed the importance of discretion on the part of the State in making indemnity selections:

. . . there is no reason why a State should not be indemnified and receive the full grant of lands lost through no fault of its own regardless of when the loss took place. Nor is there reason to restrict selection of land from among those lands that have been surveyed. The survey of public lands is continuing; but many areas remain unsurveyed.

*The present choice to be exercised by a State in seeking indemnity lands is limited because of the large acreage which remains unsurveyed.* This tends to militate against principles of good land management, particularly in terms of consolidating viable blocks suitable for development. (*Senate Report No. 1213, 89th Cong., Second Sess., 1966; Emphasis added*).

Thus, as the Senate Committee made clear, in 1966 the basic limitation on the state's school indemnity selection discretion was the fact that much of the public domain was unsurveyed—and that restriction was removed. The right of States to make the selections was also clearly recognized in 1958 by the House Committee on Interior and Insular Affairs and the Department of the Interior. See 1958 *U.S. Code Cong. & Adm. News*, pp. 3964-3965.

#### B. Supreme Court Confirmation

This Court reviewed the comparative scope of discretion to be exercised by the States and the Secretary of the Interior in connection with indemnity selections when it decided *Payne v. New Mexico*, 255 U.S. 367 (1921), and *Wyoming v. United States*, 255 U.S. 489 (1921). The lower court examined these decisions in some detail, as is shown from the following extracts from its opinion:

Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.

*Payne v. New Mexico*, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from canceling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here). The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:

If you will waive or surrender your titled tract in the reservation, you may select and

take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

255 U.S., at p. 370.

Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne*, *supra*, noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:

The words relied upon (subject to the approval of the Secretary of the Interior) are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

255 U.S., at p. 371

*State of Wyoming v. United States*, *supra*, involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu

selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to "*waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state.*" See: *California v. Deseret Water, Etc., Co.*, 243 U.S. 415 (1917); *Payne v. New Mexico*, ante, 367. Other laws of general application, §§441, 453, 2478, Rev. Stats. require that the selections be made under the direction of the Secretary of the Interior." (Emphasis supplied) 255 U.S., at 494.

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn National Forest. The selected in lieu acreage "was vacant, unappropriated, and neither known nor believed to be mineral . . . . The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . ." 255 U.S., at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary executive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited sur-

face right-certification or to show that the 80 acres was *still* not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title when the selection was made. Accordingly, Wyoming refused the tender. The commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, *and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, or still later was discovered to be mineral land, that is, to be valuable for oil.* (Emphasis supplied.)

255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful "in lieu" selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state*, but rather:

*. . . of determining whether an existing privilege conferred by Congress had been law-*



*fully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then — if they met all the requirements of the congressional proposal, including the directions given by the Secretary — they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. (Emphasis supplied.)*

255 U.S., at pp. 496, 497.

The Court equated the "in lieu" selection to a cash entry, citing to *Benson Mining Co. v. Alta Mining Co.*, 145 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in *Daniels v. Wagner*, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary's position. The Court held that when selections were made in accord with statutes it was the plain duty of the Secretary to

approve them and *that the Secretary's power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in *State of Wyoming v. United States*, *supra*, directly applicable to the contention raised by the Secretary here that the "value for value" criteria is to be employed in approving the "in lieu" selection at issue is:

*. . . If these (selections of "in lieu" lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.*

255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative *value* of tracts which are "mineral in character." The Supreme Court obliquely recognized this, *supra*, by reference to "whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected."

Thus, we conclude that the solemn bilateral agreement between the United States and the

"Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted — or those selected "in lieu" — while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in *State of Wyoming v. United States*, *supra*. (586 F.2d at 769-772; Emphasis in opinion).

### C. Summary

It is thus clear that the States have the right to determine which part of the unappropriated public domain shall be selected to satisfy school indemnity rights, and the Secretary's "discretion" is limited to a ministerial adjudication to determine whether the selections are in compliance with the statutory criteria of 43 U.S.C. §852. The Secretary argues, however, that the Taylor Grazing Act has rendered the *Payne* and *Wyoming*

cases inapplicable to school indemnity selections because under that Act he now claims to have authority to "classify" school indemnity selections. As shall now be seen, however, that argument of the Secretary is really moot because "classification" under the Taylor Grazing Act would invoke the very same statutory criteria as an administrative adjudication under the school indemnity selection statutes.

## IV. THE STATUTORY CRITERIA OF 43 U.S.C. §852 WOULD CONTROL ANY CLASSIFICATION OF SCHOOL INDEMNITY SELECTIONS UNDER SECTION 7 OF THE TAYLOR GRAZING ACT

### A. Preface

Section V of this Brief will show that there is absolutely no basis or justification for bringing school indemnity selections within the "classification" requirements of Section 7 of the Taylor Grazing Act. Nevertheless, the present section of this Brief will examine the hypothesis that, under some strained construction of the Taylor Grazing Act, school indemnity selections could be subjected to the classification procedures of Section 7. In so doing, however, Utah emphasizes that it places primary reliance on the fact that the Taylor Grazing Act has no applicability whatsoever to school indemnity selections.

With that introduction, it will now be shown that, even if school indemnity selections are to be classified under Section 7 of that Act, the criteria for classification must be those set forth in 43 U.S.C. §852 (the in-

demnity selection criteria), because Section 7 incorporates by reference the "applicable" public land law, and Section 852 is the applicable law for determining whether school indemnity selections are in accordance with the congressional requirements. And Section 852 requires that selections be on the basis of equal acreage rather than equal value.

The net result, of course, is that exactly the same result will obtain whether or not the Secretary classifies land for disposition in satisfaction of school indemnity rights under Section 7, because if the ministerial adjudication under Section 852 reveals that school indemnity selections are in accordance with the statutory criteria, then it automatically follows that the lands are "proper" for classification and disposition under Section 7. The specific language of the relevant statutes will now be examined.

#### B. Nature of Classification Criteria under Section 7

If the "classification" language of Section 7 of the Taylor Grazing Act could be construed in a broad enough fashion to encompass school indemnity selections, then it must be remembered that the classification procedures apply to a wide variety of uses and dispositions of federal land. Most of such uses and dispositions will be governed by separate public-land laws that authorize such uses and dispositions, and to the extent that Section 7 contains criteria for classification, those criteria will be supplementary to the criteria contained within the applicable public-land statute which authorizes the particular use or disposition of the federal land.

As will be shown in Section V of this Brief, *infra*, which discusses the legislative history of the Taylor Grazing Act, the basic purpose of classification under Section 7 was to determine whether homestead entries should be allowed on federal lands in grazing districts. Thus, the original enactment of Section 7 in 1934 provided that the Secretary of Interior was authorized:

... to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after the same have been classified and opened to entry  
.... (48 Stat. 1272)

The classification authority and duty of the Secretary were entirely clear under this Section. Classification applied only to homestead entries, and the statutory criteria were that (1) the lands to be opened to homestead entry had to be more valuable for the production of agricultural crops than for grazing of native grasses and forage plants, (2) homestead entries could not encompass more than 320 acres, and (3) homestead entries could not be made until the Secretary had classified the land as suitable for such purpose under criterion number (1) above. Thus, the language of Section 7 in the 1934 Act was clear and concise.

The 1936 Amendment, as discussed at some length in Section V.C of this Brief, *infra*, retained substantially the same language with respect to homestead classifica-



tion, but also authorized the Secretary to classify lands within a grazing district when such lands are:

. . . more valuable or suitable for any other use than for the use provided for under this Act [grazing use], or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . (49 Stat. 1976).

Thus, if the foregoing language relating to "lieu . . . rights" and "selection" could be construed to include school indemnity selections, the single and sole criterion is whether the lands selected are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant . . . ." If so, the selected land is to be opened for "selection . . . for disposal in accordance with such classification under applicable public-land laws. . . ." It is thus of the utmost importance to observe that the *only criterion* for classification in favor of disposition for school indemnity selection would be a determination as to whether the selected land is *proper for acquisition in satisfaction of outstanding lieu rights*.

The only conceivable way in which the Secretary can determine whether selected lands are "proper" for disposition in satisfaction of lieu rights is by determining whether the State has made a proper selection in accordance with "applicable" statutory criteria and restrictions, and those criteria and restrictions are set forth

in detail in 43 U.S.C. §852.<sup>12</sup>

Before examining the criteria and restrictions of Section 852, however, it is very important to observe that if Congress had intended to confer on the Secretary any additional discretion, or to impose any other or additional conditions or limitations on school indemnity selections, beyond those set forth in Section 852, it certainly would have done so when the 1936 Amendment to the Taylor Grazing Act was passed. This is easily illustrated by the fact that Congress did set forth a number of criteria for other kinds of land dispositions in the 1936 Amendment, and a few of those criteria deserve brief mention.

For example, the restrictions and criteria for classification in favor of homestead entries, as set forth in the 1934 Act and as quoted above, were continued in effect by the 1936 Amendment. Further, Section 8(b) of the 1936 Amendment authorized the exchange of private land for federal land:

When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of sur-

<sup>12</sup> If the Secretary's view were correct, he would not only be authorized to approve or reject school indemnity selections for any impulse, whim or caprice, but such action would be immune from judicial scrutiny. This is so because the Secretary, in his view, would be guided only by the statutory criterion that the lands be "proper" for school indemnity selection. Thus, there would be no "law to apply" and no jurisdiction for judicial review of agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

veyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands. (49 Stat. 1977).

Here again, the criteria are explicit and clear: (1) the Secretary has broad discretion in acting on any private application for exchange, and must first determine that the "public interests" will be benefited by the exchange; (2) the private land must have a value equal to or greater than the federal land to be exchanged; and (3) the federal land must be within the same State as the private land, or must be located in the nearest adjacent State and not more than fifty miles from the private base land.

No one can deny that school indemnity selection rights are far more important and sacred than offers by private persons to trade lands with the Federal Government, and no one can deny that if Congress had intended to confer on the Secretary discretion to consider "public interest" factors or impose additional criteria on school indemnity selections, it expressly would have done so, just as it did for private exchanges. It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the land for retention in federal ownership.

It might also be noted that Section 8(c) of the 1936 Amendment authorizes exchanges of state land

for federal land (not to be confused with school indemnity selection rights):<sup>13</sup>

Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: Provided, that no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secre-

<sup>13</sup> Under the 1934 Act private and state exchanges were controlled by common criteria, at least under an opinion of the Solicitor of the Interior. This was changed in the 1936 Amendment for the purpose, *inter alia*, of making state exchanges mandatory. For an explanation of the underlying conflict precipitating that part of the Amendment, see Section V.B of this Brief, *infra*.

tary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections.

Section 8(d) of the 1936 Amendment then adds further procedures and conditions for exchanges:

Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: *Provided*, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands

conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one-half of the cost of publishing notice of a proposed exchange as herein provided.

It will be noted that there are literally dozens of conditions, limitations, criteria and other provisions to spell out the exact authority and duties of the Secretary when acting on exchanges of land, including lieu selections for school lands in place (as distinguished from school *indemnity* selections for lost school lands).

Again, the pertinent observation is that the 1936 Amendment to the Taylor Grazing Act gave very detailed, express and explicit instructions with respect to classification of land for specific use and disposition, including homestead entries and exchanges of private land; and also with respect to exchanges of state land (which do not require classification). But, if the Taylor Grazing Act were to be construed so as to require classification of school indemnity selections, there are no such criteria, instructions or procedures—merely the general and vague language that the selection must be “proper” in satisfaction of the selection right under the “applicable” public-land law.



Thus, if Section 7 of the Taylor Grazing Act could be construed so as to authorize the Secretary to classify land for disposition in satisfaction of school indemnity rights, it is clear beyond question that he must consult the applicable public-land law to ascertain the conditions, limitations and restrictions which will reveal whether such school indemnity disposition is "proper". That statute, 43 U.S.C. §852, deserves closer scrutiny.

*C. Nature of Adjudication Criteria under 43 U.S.C. §852*

As will be recalled, 43 U.S.C. §851 "appropriated and granted" school indemnity lands of equal acreage to be selected by the States "in accordance with the provisions of section 852 of this title." It is most illuminating to note the detailed and specific instructions and limitations set forth in Section 852:

§852. Selections to supply deficiencies of school lands.

(a) The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be select-

ed except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection. (4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided, however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the

Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section,

and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixty sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of section 282 of this title on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than section 282 of this title, or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d) (1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327 of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the

United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time. As amended June 24, 1966, Pub.L. 89-470, §2, 80 Stat. 220.

§852a. Applications for unsurveyed lands; regulations; acreage requirements.

The Secretary of the Interior may issue regulations governing applications for unsurveyed lands. If he establishes any minimum acreage requirements, they shall provide for selection of tracts of reasonable size, taking into consideration location, terrain, and adjacent land ownership and uses. Pub.L. 89-470, §3, June 24, 1966, 80 Stat. 220.

§852b. Survey of lands prior to transfer; time for survey; availability of funds; lands suitable for transfer.

Prior to issuance of an instrument of transfer, lands must be surveyed. The Secretary of the Interior shall within five years, subject to the availability of funds, survey the exterior boundaries of lands approved as suitable for transfer to the State. Pub.L. 89-470, §4, June 24, 1966, 80 Stat. 220.

The substance of the foregoing provisions are not in dispute, and there is no point or purpose in discussing the various conditions and restrictions set forth in Section 852 as quoted above. The salient observation

is that this statute contains a comprehensive, integrated statement of congressional criteria which the Secretary of Interior must follow in adjudicating the validity of school indemnity selections. And these are the criteria which the Secretary must also follow in determining if the indemnity selections are "proper" for disposition in accordance with Utah's indemnity selection "rights."

There is no doubt that Section 852 applies to Utah's school indemnity selections, because Congress expressly provided in the Act of May 3, 1902, 32 Stat. 188, codified as 43 U.S.C. §853, that:

*All the provisions of sections 851 and 852 of this title, which provide for the selection of lands for education purposes in lieu of those appropriated for other purposes, and are made applicable to the State of Utah, and the grant of school lands to said State, including sections 2 and 32 in each township, and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said sections, anything in the Act providing for the admission of said State into the Union, to the contrary notwithstanding. (Emphasis added).*

Thus, Congress has specifically declared that Utah's school indemnity selections "shall be administered and adjusted in accordance with the provisions" of Sections 851 and 852 of Title 43, U.S.C. If the Secretary is to be permitted to "classify" land for disposition in satisfaction of those indemnity selection rights, he must consult Sections 851 and 852, and may not substitute his personal notions of public policy and public interest for the clear instructions and requirements mandated by Congress.



*D. Classification not a Condition to Vesting of Equitable Title*

Even if Section 7 of the Taylor Grazing Act could be construed so as to authorize the Secretary to classify land for disposition in satisfaction of school indemnity selection rights, it is clear that the act of classification is not a condition precedent to equitable title vesting in the State on the date that a school indemnity selection list is filed—if it is subsequently determined that such selection list satisfies the requirements of 43 U.S.C. §852.

The language in Section 7 that the Secretary hangs his hat on reads as follows:

Such lands shall not be subject to disposition, settlement or occupation until after the same have been classified and opened to entry . . . .

School indemnity selection lists are not, and have never been considered to be, “entries” in the traditional sense. The word “entry” obviously refers to homestead entries, which were the principal subject of the section, and other private entries through exchange, selection, or otherwise. Accordingly, any limitation against “disposition” prior to classification is a limitation on such private entries, but not on school indemnity selections.

Moreover, it will be noted that 43 U.S.C. §852 contains many more conditions, limitations and restrictions than the mere “classification” under Section 7, and this Court has made clear that those conditions and

restrictions do not prevent equitable title from vesting in the State at the date that the selection list is filed.

Whether equitable title vests or not is dependent on whether the statutory criteria and conditions of Section 852 have been satisfied; if so, equitable title vested as of the date of filing, and, if not, equitable title did not vest at all and the selection lists must be rejected. But the mere fact that some period of time must elapse after the date of filing and before it is known whether equitable title vested at the date of filing in no way operates to delay the vesting of equitable title until the time when the Secretary finally gets around to making his ministerial adjudication or, for that matter, his “classification” under Section 7 of the Taylor Grazing Act.

This is clearly explained in *Cameron v. United States*, 252 U.S. 450 (1920):

. . . It is of course not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to *determine the question whether or not such title has passed*. (252 U.S. at 461; Emphasis added).

As to the time when equitable title passes, the Supreme Court was sufficiently explicit in *Wyoming v. United States*, 255 U.S. 489 (1921), where, speaking with reference to a school indemnity selection, it was held that:

In principle, it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing . . . .

If these were valid then [the waiver and selection by the State]—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions [discovery of oil in the selected land at a time when mineral lands were not subject to selection]. Acceptance of such a proposal and full compliance therewith conferred vested rights which all must respect. *Equity then regards the State as the owner of the selected tract and the United States as owing the other*; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. (255 U.S. 496-97; Emphasis added).

The Court then went on to explain that the basis for equitable title was a form of equitable conversion, because the State had paid the full purchase price for the selected land and had done everything required of it to obtain title—and the only remaining act necessary for the State to obtain *legal title* was an act to be performed by the United States, *i.e.*, the ministerial adjudication by the Secretary of Interior.

When a State files a school indemnity selection, it must identify the lost school lands for which the selection is made, and the selection thus operates as a present, effective relinquishment and waiver by the State of any claim to such lost lands. It is this relinquishment

and waiver that constitutes a full payment by the State for the selected lands at the time that the indemnity selection lists are filed.

The Court said that:

. . . the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price. (255 U.S. at 497).

The Court then continued at some length to demonstrate that its prior opinions had been consistent with the proposition that equitable title passes when the purchase price is paid in full (see 255 U.S. 497 *et seq.*).

As an aside, it will be noted that the Court's analogy to a "cash entry" was not a characterization of school indemnity selections as "entries" but was a declaration that such selections are the legal equivalent of entries where the purchase price is fully paid at the time of entry.

All other decisions of the Supreme Court are fully consistent with the *Wyoming* case in holding that equitable title passes when a State files a school indemnity selection in accordance with the requirements of the applicable statutory criteria. See, *e.g.*, *Benson Mining*

*Company v. Alta Mining Company*, 145 U.S. 428 (1892); *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589 (1897); *Cameron v. United States*, 252 U.S. 450 (1920); and *Payne v. New Mexico*, 255 U.S. 367 (1921).

#### E. Summary

The foregoing section of this Brief has explored the nature and consequences of any classification which the Secretary might conduct under Section 7 of the Taylor Grazing Act to determine whether school indemnity selections are "proper" for disposition in satisfaction of such selection rights. In so doing, it has been demonstrated that such classification must be conducted in exact accordance with the statutory criteria and restrictions set forth in 43 U.S.C. §852, and that the process of classification is not a condition precedent to equitable title vesting in the State at the time the selection lists are filed.

Both the trial court and the court below so held. The trial court specifically declared that, even if it were to be assumed, *arguendo*, that the Secretary had authority to classify school indemnity selections under Section 7 of the Taylor Grazing Act, he could not apply a "comparative value" criterion because the only available law to apply to such a classification was contained in 43 U.S.C. §852, which requires such selections to be based on equal acreage. The lower court approved that holding but did not find it necessary to discuss in detail that hypothetical because it saw no reasonable possibility whereby school indemnity selections could fall within the classification requirements of Section 7.

Nevertheless, the lower court did quote, with clear approbation (586 F.2d at 763, 765 and 772), the trial court's Finding of Fact No. 12 and Conclusion of Law No. 7, which are self-explanatory, and which constitute an effective rejection of the Secretary's "comparative value" criterion even if he could "classify" school indemnity selections under Section 7:

*Finding No. 12:* The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 U.S.C. §315(f), describes the Secretary's classification authority in the following language:

. . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4 above, are located within grazing



districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections, as part of any classification procedure.

*Conclusion No. 7:* Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selec-

tion . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act. (586 F.2d at 765).

## V. THE TAYLOR GRAZING ACT IS INAPPLICABLE TO SCHOOL INDEMNITY SELECTIONS

### A. *Inapplicability of the Taylor Grazing Act of 1934*

The Taylor Grazing Act was enacted by Congress in 1934 as H.R. 6462, Public Law No. 482, of the 73rd Congress, Second Session, Act of June 28, 1934, 48 Stat. 1269, now codified as 43 U.S.C. §315 *et seq.* There is no conceivable way in which the Taylor Grazing Act of 1934 can be construed to confer upon the Secretary of the Interior authority to "classify" lands within a grazing district as a condition precedent to the selection of such lands by a State as indemnification for lost school lands.<sup>14</sup>

<sup>14</sup> The Secretary repeatedly makes claims in his Brief with respect to his alleged authority, or with respect to statutory construction, that are either misstated or overstated. For example, at pp. 13-14, the Secretary declares:

The court of appeals in the present case has suggested that under the amended statute, the Secretary is obliged to approve Utah's indemnity selections of mineral land, if he determines that the lost school sections were also mineral. This is incorrect. The 1958 amendments did not affect the Secretary's discretion under Section 7 of the Taylor Grazing Act; they merely expanded the set of public lands among which the states may choose in making their in-lieu selections.

The foregoing quote is misleading because it flatly declares that the holding of the Court is "incorrect", when in fact the Secretary simply disagrees with the lower courts construction of the Taylor Grazing Act.

Another illustration is the use of *ipse dixit*, such as that on pp. 34-35 of the Secretary's Petition, wherein it is said that "... although the Taylor Grazing Act refers only to withdrawal from 'all forms of entry or settlement,' the latter phrase is properly construed to comprehend school-grant indemnity selections." The Secretary does not say why the latter phrase is properly construed to include such indemnity selections.

There is nothing in the language of the Act itself, or in its legislative history, that remotely suggests that it is to have any application to state school indemnity selections. The Taylor Grazing Act of 1934 was entitled:

AN ACT To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. (48 Stat. 1269).

A careful reading of the entire Act reveals that it was in fact designed to control and regulate grazing on the public lands. Section 7 of the Act—the provision which the Secretary cites as the source of his "classification" authority—provided in pertinent part that:

... the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry . . . . (48 Stat. 1272).

The above provision is entirely clear. The Secretary was authorized and required to classify lands located within grazing districts established under the act before such lands could be opened to entry for homesteading. In so doing, the Secretary was guided by a basic criterion—whether the land under examination

had a higher and more beneficial use for the production of crops (homestead use) than for livestock grazing of native grasses and forage plants (the grazing use if the land was retained in federal ownership). The clear congressional instruction was that lands within grazing districts should be classified for homestead entry if their potential for agricultural crops exceeded their value for grazing, and to deny such classification if grazing appeared to be the more valuable use. This statutory language could not be construed to authorize or require the Secretary to classify lands within a grazing district as a condition precedent to selection by a State in satisfaction of its school indemnity rights. The Secretary had no authority under the 1934 Act to classify lands for any use or purpose other than grazing or homesteading.

*B. Inapplicability of H.R. 3019 and S. 2539 (1935)*

The Secretary has been unable to find any legislative history to support his argument that he has authority under Section 7 of the Taylor Grazing Act to classify lands for disposition for school indemnity, and has therefore turned to some legislative history of a bill that never became law. (Secretary's Brief, pp. 45-48). That bill was introduced in Congress in 1935 as H.R. 3019 and S. 2539, and would have amended the Taylor Grazing Act, but received a pocket veto by the President.

Even so, it appears that the Secretary misperceives the controversy that surrounded the 1935 Bill. The concern was with state exchanges—not school indemnity

selections. It is entirely clear that Congress understood in 1935 that school indemnity selections were exempt from the Taylor Grazing Act. Some background events will illustrate this controversy.

On October 25, 1934, Nathan R. Margold, Solicitor of the Department of the Interior, issued an Opinion concerning the authority and discretion of the Secretary of the Interior when acting on exchange applications filed by States pursuant to Section 8 of the Taylor Grazing Act as enacted in 1934 (found at pages 62-64 of the Hearings on S. 2539 before the Committee on Public Lands and Surveys, United States Senate, 74th Congress, 1st Session, June 12, 1935 (hereinafter referred to as Committee Hearings)). Solicitor Margold ruled that under Section 8 the Secretary had the same measure of discretion with respect to both private exchanges and state exchanges, and that in both cases he was authorized to consider the "public interests" in deciding whether to approve or reject proposed exchanges. Section 8 provided with respect to private exchanges that (1) The Secretary was to consider the "public interests" of the proposed exchanges, and (2) federal lands to be traded in exchange for private lands could not exceed the value of the private lands. Later in Section 8, speaking with respect to state exchanges, the statute provided that such exchanges should be "in the manner provided for exchange of privately-owned lands in this Section." It was that language which led Solicitor Margold to reach the conclusion explained above.

About one month later, on November 26, 1934,



President Roosevelt issued Executive Order No. 6910, which temporarily withdrew all of the unreserved and unappropriated public land in several Western States, including Utah, from "settlement, location, sale or entry" and reserved such land for classification to determine the most useful purposes for such land. This Executive Order was issued pursuant to the Pickett Act, 43 U.S.C. §141, and the Taylor Grazing Act, 43 U.S.C. §315a, *et seq.*

The Department of the Interior took the view that Executive Order No. 6910 prevented state exchanges, and so that Order was amended on May 20, 1935, by President Roosevelt, "to authorize the Secretary of Interior, in his discretion and in harmony with the purpose of said Act of June 28, 1934, to accept title to base lands *in exchange* for other land subject to such *exchange* under the terms of the Act." (Emphasis added). It is interesting to note that the President issued this Amendment only five days after the Senate commenced hearings on S. 2539 and began to hear the complaints of the States.<sup>15</sup>

Thus, in summary, under the Amendment to Executive Order No. 6910, state exchanges were clearly authorized in the "discretion" of the Secretary, and under Solicitor Margold's Opinion of October 25, 1934, the Secretary was not obligated to approve state exchanges but was to determine in his discretion whether such exchanges should be approved after considering the "public interests" as he perceived them. Solicitor

<sup>15</sup> Nowhere does the Secretary of the Interior mention the May 20, 1935 Amendment to Executive Order No. 6910.

Margold's Opinion and Executive Order No. 6910 met with much disfavor in the public land States because of the difficulty in making land exchanges—as distinguished from school indemnity selections—and this was the controversy that highlighted the hearings on H.R. 3019 and S. 2539.

Arthur H. King, Register of the State Board of Land Commissioners of Colorado, appeared before the Senate Committee on Public Lands and Surveys on June 12, 1935, when S. 2539 was being discussed. He explained that he had just learned of the May 20, 1935, Amendment to Executive Order No. 6910:

*Mr. King.* I have just been advised that the President's Executive Order withdrawing these lands has been modified to such an extent that it will allow exchanges to be made wit (sic) the States. So, there is only one remaining thing, and that is the procedure by which this exchange may be made.

Committee Hearings on S. 2539, p. 46, June 12, 1935.

Mr. King then explained that the only concern that prompted him to appear before the Committee was the problem of state exchanges, and Senator Alva B. Adams of Colorado made clear that such exchanges were intended to be mandatory on the part of the Secretary:

*Mr. King.* That is my only object in appearing here today, gentlemen, is that the exchange, if upon application by the State, shall be made without referring it to a stock growers' association or someone else as to whether it is proper to do so.

*Senator Adams. I want to say for you and for the record that if it had not been for that interpretation and that language, the bill would never have passed. I want to say for the benefit of those concerned with the administration, who are in this room, that they should know that if there had been any doubt as to whether the exchange of these lands upon application by the State was discretionary with the Secretary of the Interior the bill would never have passed the Senate.*

Committee Hearings on S. 2539, p. 49, June 12, 1935 (emphasis added).

Senator Adams also expressed his displeasure with Solicitor Margold's opinion:

*Senator Adams. I have not a bit of patience with that, and it is utterly in conflict with what the Interior Department was intended to be authorized and directed to do, and Mr. Poole and those here know that is what the committee intended to do; and had they known that this interpretation was going to be placed upon it, it would never have passed.*

Committee Hearings on S. 2539, p. 49, June 12, 1935.

Rufus G. Poole, Assistant Solicitor of the Department of the Interior, and Senator Robert D. Carey of Wyoming had the following dialogue concerning the Margold Opinion:

*Senator Carey. Have you the opinion there?*

*Mr. Poole. Yes sir; I have. Before I turn it over to the reporter I desire to make a few comments on it, if I may.*

*Senator Carey. When were these regulations issued for the exchange of State lands; how long ago?*

*Mr. Poole. I will have to look at the date. It was February 8, 1935.*

*Senator Carey. You have made no exchanges?*

*Mr. Poole. No; there have been none made.*

*Senator Carey. You stated this morning, I think, that you recognize the right to select its lands anywhere by the State?*

*Mr. Poole. That is correct. It is so provided within the rules and regulations. The States may select either within the district or outside the district.*

*Senator Carey. Do you interpret it also that the State may select lands when a district has not been granted? They could only select lands in return for those lands which might be in a district if it is created, is that it, if it was occupied?*

*Mr. Poole. No. Even in the absence of the creation of any district they will be permitted to go ahead with their exchanges.*

*Senator McCarran. Who would be permitted, for the clarification of the record?*

*Mr. Poole. The States would be permitted to consummate their exchanges.*

*Senator Carey. In other words, they have a right to exchange any of their land for any Government land providing the values were equal; is that correct?*

*M. Poole. That is correct.*

Committee Hearings on S. 2539, p. 64, June 12, 1935.

Later in the Hearings, Assistant Solicitor Poole and Senator McCarran of Nevada further discussed Solicitor Margold's Opinion, and Poole seemed to agree more with the Senate Committee than with Solicitor Margold:

*Mr. Poole.* Now, I wish to read and comment again briefly on the opinion which was rendered by the Solicitor on October 25th, with reference to exchanges with the States. It was my privilege to sit in executive session when the exchange section was under consideration.

*Senator McCarran.* Executive session with whom?

*Mr. Poole.* The Public Lands and Surveys Committee. *And it was certainly my understanding at that time that that provision was meant to be mandatory insofar as it was possible, despite the fact that the question of value was one to be determined by the Secretary . . .*

*Senator McCarran.* Who rendered that opinion?

*Mr. Poole.* The Solicitor of the Interior Department, Mr. Margold.

. . . .

*Senator Carey.* That would mean that the Secretary could use that as a reason for not making exchanges, would it not; that is, he could say it was not in the public interest to make it, so that it leaves it with your discretion, with the Secretary?

*Mr. Poole.* It would leave the question of public interest up with him for determination.

Committee Hearings on S. 2539, p. 69, June 12, 1935 (Emphasis added).

Arthur H. King, Register of the State Board of Land Commissioners of Colorado, was again assured by Senator Alva B. Adams of Colorado that Solicitor Margold's Opinion on state exchanges was contrary to the intent of Congress when the Taylor Grazing Act was passed in 1934:

*Senator Adams.* I may say this to you, Mr. King: With all due respect to whatever Mr. Margold may have said, that *it was the intention of those who drafted this clause in the bill that so far as State exchanges were concerned it was to be mandatory. It was therefore so put in the bill, and that was the understanding of every member of the Public Lands Committee. . . . Now, that was perfectly plain to the members of the committee when that was put in.*

*Mr. King.* I think, Senator, that is contrary to the opinion of Solicitor Margold.

*Senator Adams.* I do not care. You know who is the final authority in this matter. Congress is the final authority, and we can very readily make this so that the solicitor will understand it.

*Senator Carey.* We can clear it up.

*Senator Adams.* Yes; if there is any doubt about it.

Committee Hearings on S. 2539, pp. 42-48, June 12, 1935. (Emphasis added).

Commissioner King of Colorado also discussed with several senators the practice of the Interior Department concerning exchanges proposed prior to the May 20 Amendment:



*Senator Costigan.* Commissioner King suggested that the law be constituted as mandatory in form.

*Senator McCarran.* Just what does that mean, please?

*Mr. King.* It means if we apply to have these lands exchanged that no one will stop us, except the proposition that we cannot get together on a valuation basis.

*Senator McCarran.* I understand.

*Senator Adams.* Have you made application for exchange?

*Mr. King.* We have not. We were given to understand first that the withdrawal did not permit an exchange, there was no land to select.

*Senator Adams.* Who told you that?

*Mr. King.* That has been the case.

*Senator Adams.* I say who told you that? I wondered who was repealing the law, that is all I am interested in.

*Mr. King.* The President's Executive order withdrawing this land.

*Senator Adams.* I know, but who told you you could not make application?

*Mr. King.* You can make application.

*Senator Adams.* They told you it would not do any good?

*Mr. King.* They did not tell us it would not do any good, but they said that no action would be taken on it. This land was withdrawn, but I understand recently the President's order has been modified to allow these exchanges.

*Senator O'Mahoney.* But that still does not answer Senator Adams' question as to who told you by reason of the President's Executive order the exchanges could not be made?

*Mr. King.* I would not want to answer that definitely without looking up the correspondence on it.

*Senator McCarran.* Is it not true that the statement in general substance has been given out to those who have held meetings throughout the country?

*Mr. King.* It is.

*Senator McCarran.* And when I say meetings throughout the country I mean meetings in the several sections of the country bearing on the Taylor Grazing Act.

*Mr. King.* That has been the information given out, that they could not be exchanged because the Executive order withdrew everything.

*Senator Adams.* Mr. King, you know Congress still has some authority, and this act specifically directed the doing of these things and there is not authority, in my judgment, for an Executive order to affect it.

*Mr. King.* That is true, Senator, except if there is nothing to trade for.

*Senator O'Mahoney.* There was everything to trade for.

*Senator Adams.* They had every bit of land the Government owned with the public domain, within or without the grazing area. That is what the statute says.

The most meaningful summary of problems and concerns which had arisen under the administration of the 1934 Act was contained in a formal report of the Resolutions Committee of the State Land Board Commissioners of the Western Public Land States. That Committee convened in Denver, Colorado, on February 11 and 12, 1935, at the request of Secretary of the Interior Harold I. Ickes. The Committee prepared a formal report containing fifteen resolutions, and was signed and submitted by representatives of eleven States: Arizona, California, Colorado, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

The Report of the Western Public Land States was presented to the Senate Committee by Le Grand Patrick, Deputy Commissioner of Public Lands of the State of Wyoming, and appears at pages 29-33 of the Committee Hearings. Mr. Patrick, by way of introduction, explained:

The principal thing we are interested in, of course, is section 8, providing for the exchanges of our own land, and since I have come to Washington I have learned that the Executive order provides for such exchanges.

*Senator O'Mahoney.* You mean the Executive order of May 20?

*Mr. Patrick.* Yes; the Executive order of May 20, as modifying the withdrawal to the extent we can go ahead.

Committee Hearings on S. 2539, p. 29, June 15, 1935.

A careful reading of the entirety of the Report and Resolutions of the Western Public Land States clearly reveals that the problems and controversies under the Taylor Grazing Act were concerned exclusively with exchanges, and not with state indemnity selections. As a preface to the Resolutions, the Western Public Land States made the following statement:

We, the undersigned representatives of State land boards from the western States, called together by Hon. Harold I. Ickes, Secretary of the Interior, in public meetings held at Denver, Colo., on February 11 and 12, 1935, to consider the administration of the Taylor Grazing Act, do hereby most respectfully set forth certain facts, circumstances, opinions, conclusions, and requests with regard to the relation of the Taylor Grazing Act to the land grants previously made by the United States to these western States for the support of public schools and for other State purposes:

Upon the admission of the several western States into the Union, large areas of land were granted to these States by the United States for the support and maintenance of public schools and for other State purposes. The lands were granted for well-defined purposes and upon certain conditions expressed and implied in the grants. These various land grants were accepted by the respective States upon the terms and conditions on which they were made. The granting by the United States and the acceptance by the several States became contracts valid and binding upon both parties. In accordance with the intent and purposes of the various grants, the State courts have held that the lands do not belong to the States out and out, but that the States

are trustees for the real beneficiaries of the grants, that is, for the public schools and other State institutions.

Committee Hearings on S. 2539, pp. 29-30, June 15, 1935.

The Report then goes on to explain that there may be a basic conflict in concept between management of school lands and federal lands located within grazing districts, because the school lands were intended to be utilized in such a manner as to derive maximum revenue for the support of the public schools, whereas lands placed within grazing districts were to be managed for certain conservation purposes rather than for maximum revenue production. For that reason, the States wanted to have the right to exchange original school grants in place that were located within grazing districts for lands outside of grazing districts.

All of the Resolutions proposed by the Western Public Land States dealt with problems related to such exchanges, and the basic theme was that Section 8 of the 1934 Act should be amended so as to make it mandatory that the Secretary of the Interior approve exchanges proposed by the States. However, and most significantly, the Western Public Land States had no objections or complaints with respect to school indemnity selections, since Resolution No. 10 of that Report clearly recited that school indemnity selections for quantity grants were exempt from the Taylor Grazing Act by virtue of Section 1 thereof, and requested Congress to continue this exemption in force and effect, in order

to protect the States' rights in school indemnity selections:

10. That we desire and respectfully represent that section 1 of the Taylor Act should be literally construed in all its parts, but particularly as to the status of the grazing districts as a "reservation." The language of the act is plain and unequivocal that—

"Nothing in the Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore initiated under existing law validly affecting the public lands, and which is maintained pursuant to such except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any state . . ."

That several of these signatory States have thousands of acres remaining in their quantity grants which have not been satisfied, and that if contrary to the language of the Taylor Act, the grazing districts are classed as a "reservation" of the class and effect of the national forests, and others, no land will remain for selection, and the remaining portions of the quantity grants will, in effect, be canceled. The purposes for which they were made by the National Congress would thereby be defeated, and the beneficiary schools and colleges and other public institutions would suffer severe pecuniary damage.

Committee Hearings on S. 2520, p. 22, June 15, 1935.

As will be seen, Congress in 1936 did amend Section 8 of the Taylor Grazing Act so as to make state exchanges mandatory. Those exchanges are exempt



from the classification requirements of Section 7 of the Act. It seems clear beyond question that if there had been any problem with the States consummating their school indemnity selections after the 1934 Act, Congress certainly would have provided appropriate protection to school indemnity selection rights in 1936 when it amended that Act, just as it did with respect to exchanges. But there was no need to address any question of school indemnity selections, because it was the understanding of Congress and all of the Western Public Land States in 1934, 1935 and 1936 that Section 1 of the 1934 Act provided an absolute exemption for any lands that were or would be "a part of any grant to any state."

### *C. Inapplicability of the 1936 Amendment to the Taylor Grazing Act*

#### *1. Legislative History of the 1936 Amendment*

Representative Taylor of Colorado was the sponsor of the original Taylor Grazing Act of 1934,<sup>16</sup> and when his bill (H.R. 6462) was originally introduced in 1934 it purported to authorize 173,000,000 acres of public domain to be included within grazing districts so that the public range lands could be regulated, managed and protected. The bill was amended, however, and the final enactment reduced the allowable acreage to a maximum of 80,000,000 acres (see Section 1 of 48 Stat. 1269).

<sup>16</sup> Between 1908 and 1932 twenty-three separate bills were introduced in Congress to regulate grazing on the public domain. Representative Colton and Senator Smoot of Utah introduced a number of these bills. Not one of these twenty-three bills ever suggested that school indemnity selections would be restricted, impaired or affected in any way.

Then, in 1936, Representative Taylor introduced H.R. 10094 in the 74th Congress, Second Session, to increase the allowable acreage within grazing districts by amending Section 1 of the 1934 Act, and this bill was enacted into law as the 1936 Amendment to the Taylor Grazing Act (49 Stat. 1976). But, before examining the specific language of the 1936 Amendment, Representative Taylor's explanations on the floor of the House as to the purpose of H.R. 10094 are illuminating:

I want to digress a moment to say that the original bill as I introduced it [referring to H.R. 6462, which became the 1934 Act] applied to all of the remaining vacant, unappropriated, and unreserved land of the public domain of the United States, at that time estimated at 173,000,000 acres, and the bill passed the House in that form. One of the hamstringing amendments added by the opponents of the bill during 3 months' debate in the Senate reduced the acreage to which the law could be applied to 80,000,000, leaving the remaining half of the public domain open to free exploitation, as it has been ever since.

Realizing the ruinous absurdity of this condition and the inevitable and rapid destruction of the remaining unprotected public land, the chairman of the Public Lands Committee of the House, Mr. De Rouen, of Louisiana, at the opening of Congress in January 1935, introduced a bill making all public land subject to the provisions of this grazing-district law. The opponents of the law again loaded that bill with so many injurious amendments that the President was compelled to and did veto it.

Soon after the opening of this session of Congress I introduced another bill (H.R. 10094)

merely amending the Taylor Grazing Act by increasing the amount of public lands, subject to its provisions, from 80,000,000 acres to 143,000,000 acres and making no other change in the law—just changing the figure 80 to 143. The bill passed the House unanimously March 16. It remained peacefully in the Public Lands Committee of the Senate from that time until last Monday, the 15th of June, when it was reported out with five riders amending other sections of the law and adding a new section.

While I somewhat doubt if any of these proposed new provisions should or could pass either the Senate or the House on their own merits in an independent bill, nevertheless I hope the bill will pass even in that form and become a law before this session of Congress adjourns. Otherwise the remaining public domain that is not already practically destroyed will very soon be utterly ruined by overgrazing and tramping out all the verdure on it. (Cong. Record, Vol. 80, Part 10, 74th Cong., Second Sess., House of Rep., June 19, 1936, at pp. 10281-82).

There is no further explanation in the proceedings in the House of Representatives to shed any light on the meaning intended by the amendments added by the Senate. Representative Taylor had earlier explained the purpose of his bill (H.R. 10094) on the floor of the House on March 16, 1936:

*Mr. Taylor of Colorado.* Mr. Speaker, the object of this bill is to bring all the remaining public domain under the provisions of the Taylor Grazing Act that was enacted into law June 28, 1934 (48 Stat. 1269). The way the bill passed the House in the spring of 1934 it applied to

all the remaining public domain in the United States. The bill was amended in the Senate limiting its application to only 80,000,000 acres of vacant, unappropriated, and unreserved lands of the public domain. This bill only changes one word in that law. It extends that limitation of 80,000,000 to 143,000,000 acres and will enable all the Western States to come in and put all of their remaining public lands under this law if they desire to do so.

*Mr. Greever.* I should like to ask the gentleman, Is the bill properly safeguarded so that the rights of the States to exchange their lands for lands of the United States are preserved?

*Mr. Taylor of Colorado.* This bill makes no change whatever in the existing law except in one word. It changes eighty to one hundred and forty-three. That is in the first section of the present law. (Cong. Record, Vol. 80, Part 4, 79th Cong., Second Sess., House of Rep., March 16, 1936, at page 3815).

The legislative history of H.R. 10094 in the Senate sheds relatively little light on the intended meaning of the 1936 Amendment. On June 15, 1936, Senate Report No. 2371 was ordered to be printed by the Committee on Public Lands and Surveys, 74th Cong., Second Sess., and that report declares, with respect to Section 7, that:

It is proposed to amend section 7 of the Taylor Grazing Act so as to provide a more practical and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing.

The next to the last paragraph of that Report, as it appears on page 3, summarizes the intended effect of H.R. 10094 in the following language:

It should be understood that the raising of the limitation will not impair any of the other provisions of the law. Exchanges of State or privately owned land can be continued.

Just four days later, without any intervening discussion or debate, the bill was passed without objection or discussion. Senator Adams said:

Mr. President, I ask unanimous consent for the immediate consideration of House bill 10094. A few moments ago I endeavored to secure unanimous consent for its consideration, but the Senator from Oregon [Mr. McNary] then said he would not permit consideration of any legislation until the general unanimous-consent agreement had been carried out. He said there was no objection to the bill except that he did not want to interfere at that time with the program. *There will be no discussion about the bill.* It is important that it should go to the House and have an amendment concurred in there.

There was no objection and unanimous consent was given for consideration of the bill, and:

The amendment was agreed to. The amendment was ordered to be engrossed and the bill to be read a third time. The bill was read a third time, and passed. (Cong. Record, Vol. 80, Part 10, 79th Cong., Second Sess., Senate, June 20, 1936, at pp. 10479-80; Emphasis added).

There is no further legislative history, either in the House or the Senate, that offers any further illumina-

tion as to the meaning intended by Congress in the 1936 Amendment to Section 7 of the Taylor Grazing Act. Even though the legislative history of the 1936 Amendment is rather slim, it is absolutely clear that every word and every reasonable implication of that history makes clear that the Amendment was intended to be confined to the basic purposes and scope of the original Act of 1934<sup>17</sup>—and there is not the slightest justification for supposing that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the 1936 Amendment

As a point of marginal interest, Section 8 of the 1936 Amendment (43 U.S.C. §315g) did make state *exchanges* mandatory and thus deprived the Secretary of the Interior of the discretion that Solicitor Margold had said he held in the October 25, 1934, Opinion.

## 2. Text of the 1936 Amendment

It will be noted that Section 7 (43 U.S.C. §315f) recites that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

... proper for acquisition in satisfaction of any outstanding *lieu* ... rights or *land grant*, and to open such lands to ... *selection* ... for disposal in accordance with such classification under applicable public-land laws ... Such lands shall not be subject to disposition ... until after the same have been classified and opened to entry ... (Emphasis added).

<sup>17</sup> See Section V.B of this Brief for explanation as to why Section 8 was amended to make state exchanges mandatory.



It is the above language that is relied on by the Secretary as his source of authority for classifying land prior to the exercise by a State of its school indemnity selection rights, and that matter will now be examined.

### 3. *Reasons Why the 1936 Amendment is not Applicable to School Indemnity Selections*

There are a number of compelling reasons why the 1936 Amendment should not be construed so as to authorize or require the Secretary of Interior to classify lands within a grazing district as a condition precedent to their selection by a State in satisfaction of school indemnity rights. Some of these reasons are summarized below:

#### a. *Express Exemption for School Indemnity Selections*

The 1936 Amendment to the Taylor Grazing Act did not amend the exemptions contained in Section 1 of the 1934 Act, and those exemptions (43 U.S.C. §315) include school land grants:

*Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validity affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. (Emphasis added).*

Thus, it is clear that nothing in the Taylor Grazing Act is to be construed as "affecting" the disposition of any land that would be a part of any grant to any State. It has already been shown that school indemnity lands are express "grants" to the States. Indeed, Section 6 of the Utah Enabling Act, 28 Stat. 107, provided that Utah's school indemnity lands "are hereby granted to said State for the support of the common schools", and 43 U.S.C. §851 provides that school indemnity lands "are hereby appropriated and granted".

It seems beyond dispute that school land grants are beyond the reach of the Taylor Grazing Act, and the only relevant question would seem to be whether there is some other provision in that Act which expressly contradicts the exemption for "any grant to any State." As will be seen, there is no such contradiction.

#### b. *Classification Required Only for Private Entries*

As already noted, Section 7 of the 1936 Amendment contains the language relied on by the Secretary as his sole source of authority for classifying school indemnity selections to release them from the "locked up" status they allegedly acquired by being withdrawn for classification by Executive Order No. 6910. But that language of the Act clearly seems to apply only to private rights and entries on the public domain. The relevant language in Section 7 provides that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

... proper for acquisition in satisfaction of any outstanding lieu ... rights or land grant, and to

open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . . *Such lands shall not be subject to disposition . . . until after the same have been classified and opened to entry . . . .* (Emphasis added).

It thus cannot be questioned that Congress intended the classification procedure to be a condition precedent to "entries" on the public lands; and it is difficult to see how "entries" can reasonably be construed to include land grants to the States, particularly in view of the express exemption in Section 1 of the Act. A careful reading of the entire text of Section 7 suggests that Congress was concerned with *private* entries, since the primary focus was on homestead entries—even though the Act, as amended in 1936, is broad enough to include any private "lieu, exchange or script rights or land grant"

The references to "lieu" rights, the process of "selection" of lands, and "land grants" under other statutes cannot reasonably apply to school indemnity selections. Many federal statutes have made *land grants* to private persons and entities, and have provided for *selection* of *lieu* lands by such private persons and entities. Illustrative examples would be the lieu selection rights of railroads under 43 U.S.C. §§888, 890; 25 U.S.C. §334 (selection rights of Indians not residing on reservations); 43 U.S.C. §149 (private rights of selection when private lands are included within an extension of an Indian Reservation); and 43 U.S.C. §274 (selection rights of veterans). Further, it will be remembered, Solicitor Margold in his Opinion of October 25, 1934,

referred to state exchanges under Section 8 as "lieu selections." Thus, it is clear that the pertinent language in Section 7 of the Taylor Grazing Act refers to land grants, lieu rights, and selection procedures as they pertain to *private* persons and entities, as distinguished from the rights of the States to make school indemnity selections.

This conclusion is reinforced by the fact that Section 7 made an express exemption for "locations and entries under the mining laws . . . ." Mining locations are, of course, private entries, and they are the only *entries* exempted by Section 7. It must be remembered that Section 1 of the Act exempted school land grants *from the entire reach of the Act*, whereas Section 7, which deals only with classification, exempted mining locations *from the classification requirements of the Act*. It is conceivable that if Congress had not exempted school land grants from the Act under Section 1, there might have been some justification for providing such an exemption under Section 7 from the classification requirements. But, since Section 1 had already exempted school land grants from the Act, and since Section 7 extended only to private "entries" on public lands, it would have been illogical to have made a further express exemption of school land grants under Section 7.

It would thus seem to be crystal clear that Section 7 requires classification only for *private* "entries" on the public domain, and that no disposition may be made of the public domain until the land has first been classi-

fied and "opened to entry." While no further support for this conclusion is needed, it does not seem to be amiss to note that Congress expressly explained that Section 7 was to apply only to *private* entries:

It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available for *private entry* lands which are more valuable for other purposes than grazing. (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at page 2; Emphasis added).

It is of significance that the above quotation is from the legislative history of the 1936 Amendment, which the Secretary relies on exclusively as his source of authority for classifying school land grants under Section 7.

In brief summary, it may be said that:

(1) Section 1 of the Taylor Grazing Act expressly exempts school land grants from all parts of the Act;

(2) Section 7 requires classification of all lands within a grazing district before such land will be open to *private* entry and disposition; and this construction is further compelled because:

(a) Section 7 expressly deals with various types of private entries and expressly exempts mining claims (private entries) from classification;

(b) Section 7 expressly prohibits disposition of lands within a grazing district until the same have been classified and opened to *entry*;

(c) Congress said, in amending the Taylor Grazing Act in 1936, that the classification requirement extended only to *private* entries; and,

(d) There is not *one word*, anywhere, in the Taylor Grazing Act or in its legislative history that is inconsistent with the clear congressional intention to exempt school land grants from that Act and to require classification of public lands within grazing districts prior to *private* entry.

#### c. *Judicial Authority Exempts School Indemnity Selections*

There are no cases other than the decisions of the trial court and court of appeals in this case, which have ruled directly upon the question as to whether school indemnity selections are subject to classification under Section 7 of the Taylor Grazing Act, but several cases implicitly confirm that Section 7 requires classification only for *private* entries and not for indemnity selections.

For example, *Carl v. Udall*, 309 F.2d 653 (D.C. Circ. 1962), seems to hold that classification under Section 7 is required for *private* selection of lieu lands to replace lands which conflicted with an early railroad grant. Similarly, *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970), held that the Secretary had broad discretion under Section 8 of the Taylor Grazing Act in deciding whether to approve *exchanges* of land. The important point, however, is that the circuit court observed that the Taylor Grazing Act had nothing to do with school indemnity selections. It will be remembered



that *Payne v. New Mexico*, 255 U.S. 367 (1921), sustained the validity of the state's school indemnity selection under 43 U.S.C. §§851-52; and in *Lewis v. Hickel*, *supra*, the Court distinguished such school indemnity selections from exchanges under the Taylor Grazing Act:

*Payne v. New Mexico* involved the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. *However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with . . . . Under the Taylor Grazing Act the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (427 F.2d at 676; Emphasis added).*

While the above statement is only *dictum*, it is entirely clear that the Court viewed *Payne v. New Mexico* and the school indemnity statutes as "inapposite" to the Taylor Grazing Act because the indemnity statutes conferred absolute rights if the selections were filed in accordance with applicable statutory criteria, whereas the Taylor Grazing Act conferred broader discretion on the Secretary of Interior. This is extremely significant. *Lewis v. Hickel* was decided in 1970, some thirty-four years after the 1936 Amendment to the Taylor Grazing Act. Surely if the circuit court had thought that the Taylor Grazing Act had amended, changed or otherwise affected school indemnity selection rights, then it would have said that *Payne v. New Mexico* was inapposite *because the statutes therein construed*

*had been changed* by the Taylor Grazing Act. But the Court did not say that—it said that *Payne* was inapposite to the Taylor Grazing Act because it was decided under entirely different statutes.

Other cases illustrate exactly the same point. Thus, in *Wilcoxson v. United States*, 313 F.2d 884 (D.C. Circ. 1963), the plaintiff cited *Wyoming v. United States*, *supra*, in support of his right to a patent under the Isolated Tracts Act. *Wyoming v. United States*, like *Payne v. New Mexico*, had construed the school indemnity selection statutes in favor of the State to compel the Secretary of Interior to approve the state's school indemnity selection. The Court distinguished the Secretary's ministerial duty under the selection statutes from his broader discretionary authority under the Isolated Tracts Act. Speaking with reference to *Wyoming v. United States*, the Court said:

We agree with the court below that such cases are inapposite since they arose under statutes different from the Isolated Tracts Act. *In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights to the lands. Hence, the power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised. But in the Isolated Tracts Acts Congress chose a wholly different method for disposing of interests in the public domain . . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The dis-*

inction is between a positive mandate to the Secretary and permission to take certain action in his discretion. (313 F.2d at 888; Emphasis added).

The point of present emphasis is not the range or nature of the Secretary's discretion, but, rather, the fact that the Court distinguished the *Wyoming* case on the ground that it had been decided under separate statutes which conferred absolute rights of school indemnity selection on the States if the selections satisfied the statutory requirements. Again, the *Wilcoxson* case was decided in 1963, some twenty-seven years after the 1936 Amendment to Section 7 of the Taylor Grazing Act, and if the Court had thought that the latter statute had changed the nature of school indemnity selection rights, it would have distinguished the *Wyoming* case on that ground. But it didn't! The language of the opinion is very clear to the effect that the Court considered school indemnity selection rights to be the same in 1963 as in 1921 (when the *Wyoming* case was decided).

*Ferry v. Udall*, 336 F.2d 706 (9th Circ. 1964), also illustrates the same point. The issue was the same as in the *Wilcoxson* case, and, in distinguishing the *Wyoming* case, the Court said:

The Supreme Court held that the statutes constituted an offer to Wyoming, the compliance with which became mandatory once the State accepted the offer in accordance with the statutes. The discretion of the Department of Interior was limited solely to determining whether the statutory conditions had been met. (336 F.2d at 713).

Once again, if the Court had thought that the *Wyoming* case was no longer good law as a result of any change or impact arising from the Taylor Grazing Act, it would have noted that fact. But it didn't! The Court clearly indicated that in 1964 it believed the *Wyoming* case still to be of full force and effect, but distinguished it on the ground that it construed the school indemnity statutes and not the statute then before the circuit court.

Thus, while there is no square holding (other than the decisions below) to the effect that the Taylor Grazing Act has no application to school indemnity selections, the cases clearly and uniformly suggest that the school indemnity rights of the States under 43 U.S.C. §§851-52 have not been diminished or impaired, that the Secretary's range of discretion has not been enlarged, and that *Payne v. New Mexico* and *Wyoming v. United States* continue to be the controlling law with respect to the States' rights of selection and the Secretary's duty to approve the selections if they comply with the statutory criteria of 43 U.S.C. §852. And the court below expressly so held.

#### d. *Legislative History Confirms Exemption of School Indemnity Selections*

To put it directly, it plainly and simply is unthinkable that Congress would have intended to limit or restrict school indemnity selection rights in any way through the enactment of the 1936 Amendment. That Amendment was sponsored and supported by congressmen from the western public-land States—the very

States that depended so heavily on school land grants and indemnity selection rights. How can any reasonable mind suppose that Congress intended to weaken, restrict or limit the school indemnity selection rights *without one word, anywhere*, in any part of the legislative history that even remotely suggests or hints that such selection rights would in any way be affected? To the contrary, Representative Taylor repeatedly emphasized that the 1936 Amendment was to do nothing more than enlarge the acreage encompassed by the Act, that the rights of the States would not be disturbed or diminished, and that Section 7 as revised required classification only for private entries.

e. *Exchanges Exempt under Section 8(c)*

Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), also amended by the 1936 Amendment, authorizes *exchanges* of state-owned lands for federal lands located within a grazing district. These exchanges are exempt from classification under Section 7. It would be ridiculous to suppose that Congress would exempt such land "trades" from classification, but would, at the same time, relegate school indemnity selections to a lower status than land trades, thus requiring school indemnity selections to be subject to classification.

The final paragraph of Section 8(c) provides:

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The *selection* by the State of lands in *lieu* of any such protracted

school sections shall be a waiver of all of its right to such sections. (Emphasis added).

The *lieu* selections mentioned in the above statute must be distinguished from school indemnity selections. The exchanges authorized by Section 8(c), so far as school lands are concerned, are the *original school grants in place*, where the State has received title, or is authorized to receive title at the date of survey. In short, these are school sections that *have not been denied to the State* by federal pre-emption or private entry prior to survey. They are not indemnity lands.

School indemnity selections, on the other hand, are of an entirely different character. A State is entitled to indemnity lands *only when* original school grants in place are denied to the State by virtue of federal pre-emption or private entry prior to survey. For that reason, the grant and appropriation in 43 U.S.C. §851, and the restrictions and limitations on the exercise of the grant as set forth in 43 U.S.C. §852, relate and apply only to school indemnity selections in lieu of lost school lands. And, by contrast, the exchanges of school lands in place (the original school grants) as authorized by Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), are governed and controlled by said Section 8(c).

The Secretary's applicable regulations for exchanges under Section 8(c) are found in 43 C.F.R. 2210. In particular, Regulation 2211.0-3(b)(2) provides that:

State exchanges are not subject to the classification requirements of Group 2400 of this chapter.



In view of the fact that school indemnity lands have been granted to the States by Congress to create a solemn public trust, and in view of the language of the Taylor Grazing Act and its legislative history, it is absurd to think that school indemnity selections are subject to the classification requirements of Section 7 of the Taylor Grazing Act while land trades and exchanges under Section 8(c) are exempt. The Secretary would be hard put to advance a rational reason for such an absurd result.

By way of comparison, it might be noted that exchanges of private lands for federal lands are authorized under Section 8(b) of the 1936 Amendment, 43 U.S.C. §315g(b). With respect to these exchanges, the Secretary has rather broad discretionary authority, and must determine whether the "public interests" will be advanced by any such exchange. Private exchanges are subject to classification under 43 C.F.R. 2400.0-3(b) and 43 C.F.R. 2200. This seems to be consistent with *Lewis v. Hickel*, 427 F.2d 673 (9th Cir. 1970). It is also fully consistent with the arguments advanced by Utah in this Brief, particularly with respect to the observation that Section 7 of the Taylor Grazing Act applies only to *private* entries, exchanges and selections.

This is to say that private exchanges under Section 8(b) are subject to classification under Section 7, but state exchanges under Section 8(c) are not. Again, the Secretary would be hard put to advance a rational basis for his argument that school indemnity selection rights should be equated with private land exchanges

by subjecting both to Section 7 classification procedures.

f. *Exchanges under Section 8(c) Mandatory*

The exchanges under Section 8(c) of the 1936 Amendment to the Taylor Grazing Act (43 U.S.C. §315g(c)), as discussed above, are *mandatory*, and the Secretary is obligated to approve land exchanges proposed by the States. That provision declares that whenever any State files an application to exchange state-owned land for federal land, that:

*... the Secretary of Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end . . . .* (Emphasis added).

Section 8 of the 1934 Act had merely provided, in substance, that exchanges of state-owned land would proceed in "the same manner" as exchanges of privately-owned land. The Senate Report of H.R. 10094, which was enacted into law as the 1936 Amendment, observed that the purpose of amending Section 8 was "to make mandatory the exchange of lands upon the application of a State owning lands within a grazing district, and otherwise to perfect the section." (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at p. 2).<sup>18</sup>

It would seem highly anomalous if Congress intended to *require* the Secretary to approve *exchanges* proposed by States but to confer upon the Secretary discretion either to approve or reject the States' rights

<sup>18</sup> See discussion in Section V.B of this Brief.

of school *indemnity selection*. Yet, Section 8 clearly directs and requires the Secretary to approve such exchanges, and the Secretary now argues that Section 7 should be construed so as to authorize him to deny school *indemnity selections* by classifying the selected land for retention in federal ownership. The result of such an argument would be that even though the Secretary would be bound to approve exchanges proposed by States, he would not be bound to approve indemnity selections to satisfy school land grant entitlements.

It is also incredible to believe that Congress would authorize the Secretary to refrain from taking any action whatsoever on school indemnity selections for nearly fifteen years, as is the case in the matter now before the Court, but would, at the same time, direct the Secretary to proceed with state exchanges "at the earliest practicable date."

As noted repeatedly above, school indemnity selections are made as a matter of right to fulfill the purpose of a solemn public trust, whereas exchanges are simply land trades which occupy a much lower status of importance and priority.<sup>19</sup>

<sup>19</sup> There are several additional elements of simple logic that suggest that school indemnity selections are exempt from classification under Section 7 of the Taylor Grazing Act. While these matters need not be developed in the text of this brief, it does seem appropriate to summarize them in this note.

First, the purpose and thrust of the classification process authorized by Section 7 of the 1936 Amendment is to determine whether lands within a grazing district are adaptable to "uses" which have a higher value than grazing. The Secretary is authorized:

... to examine and classify any lands ... within a grazing district, which are more valuable or suitable for the production of crops than for the production of native grasses and

g. *Taylor Grazing Act should be Construed so as to Avoid Doubt as to its Constitutionality*

Courts favor that construction of a statute which does not raise doubts as to its constitutionality. The power which the Secretary seeks in order to classify school indemnity selections under Section 7 of the Taylor Grazing Act would be an absolute power to deny the vested indemnity selection rights of the States. This is so because the Secretary contends that he is empowered to classify any lands within a grazing district for

<sup>19</sup> Continued

forage plants, or more valuable or suitable for any other use than for the use provided for under this Act. . . . (Emphasis added).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title; and, after acquiring title, the State may put the land to whatever use it sees fit, so long as the terms and purposes of the school trust are observed. Thus, school indemnity selections involve no "uses" for the Secretary to evaluate to determine whether such uses are more valuable than the grazing use, and for this reason the "classification" procedures of Section 7 could not apply to such school indemnity selections.

A second observation is that Section 7 of the 1936 Amendment provides that lands within a grazing district shall not be disposed of until they are classified and opened to entry. School indemnity selections are not "entries" in the traditional sense, and have never been considered to be. It is thus illogical to assume that the classification procedures of Section 7 were intended to be a condition precedent to filing school indemnity selections.

A third practical reason why the 1936 Amendment does not apply to school indemnity selections is that the Amendment only applies to "unappropriated" federal lands, and school indemnity selection lands had previously been "appropriated" for school trust purposes. Thus, 43 U.S.C. 851 clearly provides that when original school grants in place do not pass to the State because of federal pre-emption or private entry prior to survey, then:

... other lands of equal acreage are hereby appropriated and granted, and may be selected in accordance with the provisions of section 852 of this title . . . . (43 U.S.C. 851; Emphasis added).

Section 1 of the Taylor Grazing Act, as it presently appears in 43 U.S.C. 315, provides that:

retention in federal ownership and against school indemnity selection, and that such a classification would not be subject to judicial review because it is within his absolute discretion. Needless to say, if the Secretary is accorded such a scope of discretion, as he now desires under the guise of "classification", then the selection rights of the States would amount to very little.

<sup>19</sup> Continued

. . . the Secretary of Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, **unappropriated**, and unreserved lands from any part of the public domain of the United States . . . . (Emphasis added).

Since the Secretary's administrative jurisdiction over federal lands in grazing districts is limited and confined to "unappropriated" public lands, and since Congress specifically "appropriated" all lands necessary to satisfy school indemnity selection rights prior to enactment of the Taylor Grazing Act, it necessarily follows that the Secretary has no authority to "classify" **appropriated** lands to determine whether they are suitable for school indemnity selection. The Taylor Grazing Act simply does not apply to any school indemnity lands, even though they may be located within a grazing district.

A fourth point of logic is that even if it should be assumed, *arguendo*, that the language of Section 7 of the 1936 Amendment could be tortured and strained so as to apply to school indemnity selections, it seems clear that any withdrawals or classifications under that statute would be suspect and subordinate to the prior "appropriation" of lands for school indemnity selection by virtue of 28 Stat. 107 (Utah Enabling Act) and 43 U.S.C. 851-52.

A fifth practical observation is that even if Section 7 of the 1936 Amendment to the Taylor Grazing Act could be construed as "withdrawing" or "reserving" public lands so as to require classification of school indemnity lands prior to disposition, it is clear that such lands were not "appropriated" by said Section 7. Since the States have a direct statutory right to select any "unappropriated" lands from the public domain, it is quite obvious that such school indemnity selections may be made without regard to the classification procedures (or any other provisions of) the Taylor Grazing Act. Specifically, 43 U.S.C. 852(a) provides that:

The lands appropriated by section 851 of this title, shall be selected from any **unappropriated**, surveyed or unsurveyed public lands with the State where such losses or deficiencies occur . . . . (Emphasis added).

The sophism advanced by the Secretary in support of his position is that the rights of the States will not be abridged or diminished at all, because they still will have their selection rights even though the Secretary denies particular selection lists by classifying the selected land for retention in federal ownership. Thus, goes the argument of the Secretary, the States can simply file new school indemnity selections, and if these new selections are also denied by the Secretary, why, then, the States can just keep on filing and filing their indemnity selections. Even though the States might never get any indemnity lands, they will always have their selection "rights".

Every acre of land in Utah is included within a grazing district (see Federal Register, Vol. 40, No. 148, Thurs., July 31, 1976, p. 32147). This means that it would be absolutely impossible for Utah to file any school indemnity selection, anywhere, without being subject to the Secretary's alleged "classification" authority. The Secretary asserts that his scope of discretion in "classifying" selected lands is very broad, that he may consider a wide range of public interest factors in deciding upon the appropriate classification, and that if he classifies the land for retention in federal ownership it remains locked within the grasp of Executive Order No. 6910. Such administrative action would not be reviewable in the courts because there is no "law to apply" to test the legality of his decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

Thus, under the Secretary's view of his "classification" authority under the Taylor Grazing Act, he could



reject every school indemnity selection list filed by Utah during the next 100 years; the courts could never review such rejections because they would be within the lawful range of the Secretary's discretion; and Utah's public school system would be denied the trust lands "granted" by Congress upon Utah's admission to the Union.

A further practical evil that could result from the Secretary's desired scope of "classification" power and discretion is that the Secretary could "classify" for retention in federal ownership all lands in Utah except an acreage of barren, worthless, waste lands equal to the number of acres which Utah is entitled to select as school indemnity lands. And, the Secretary says, such an action would not be reviewable because he has lawful discretion to so classify; and he also says that Utah's selection rights would not be impaired or diminished because Utah would be entitled to receive substitute acreage equal to its indemnity rights.

This illustrates again the irony of the double standard advocated by the Secretary: Under Section 7, the Secretary says, he may apply an equal value criterion; and *after* he has done that, he will apply the equal acreage criterion of Section 852, regardless of value, and, he says, school indemnity rights will thus be fully satisfied.

The public school trust was created through the bilateral actions of Utah and the United States, resulting from the congressional enactment of the Utah Enabling Act and the State's response in adopting appropriate provisions in the Utah Constitution. That bilateral

compact, accompanied with the federal grant, created valuable, vested rights in the State of Utah to select school indemnity lands. The construction which the Secretary seeks of Section 7 of the Taylor Grazing Act undeniably would result in a serious and substantial impairment and diminution of the value of Utah's vested selection rights, and there certainly would be a serious question as to the constitutionality of Section 7 if it should be construed in the manner requested by the Secretary.

In *Wyoming v. United States*, 255 U.S. 489 (1921), the Court said that when a State files school indemnity selections in accordance with applicable statutory criteria, such filings:

... confer *vested rights which all must respect*.  
(255 U.S. at 496; Emphasis added).

Further, the Court rejected the Secretary's argument that he had authority to withdraw the land from selection under the provisions of a 1910 statute, holding that such a withdrawal would be a violation of the rights of the State:

... by the selection this land had ceased to be public, and ... the act could not be construed to embrace it without working an *inadmissible interference with vested rights*. (255 U.S. at 508-509; Emphasis added).

The Court was speaking with specific reference to rights which had vested in the State upon the filing of the school indemnity selection lists, and not with respect

to school indemnity selection rights where no selection lists had been filed. It is equally clear, however, that the right of selection in satisfaction of the school indemnity grant is a vested right that may be exercised in the discretion of the State. Since all lands within Utah are within grazing districts, and since the Secretary contends that he is authorized to classify all such lands, and in his absolute discretion to deny any selection lists filed, the net result would be that Utah would have no selection rights whatsoever, but would simply have to request the Secretary, in his discretion, to allow some school indemnity selections for some lands, somewhere, within the State of Utah. It is this result that would cast a serious cloud over the constitutional validity of Section 7 of the Taylor Grazing Act if the Secretary's argument is adopted.

If two alternative constructions of a statute are plausible, and one construction would render the statute unconstitutional while the other would sustain the statute as valid, then the courts will adopt the construction that will sustain the validity of the statute. Further, if the court can find a reasonable construction of a statute that will avoid reaching a question as to its constitutionality, then that course of action will be followed (*United States v. Hayman*, 342 U.S. 205 (1952); *Barr v. Matteo*, 355 U.S. 171 (1958)).

To construe Section 7 of the Taylor Grazing Act in such a manner as to authorize or require the Secretary to classify land for disposition in response to school indemnity selections is to create a serious question as to the constitutionality of the statute; whereas if the statute

is construed so as to exempt and exclude school indemnity selections from the scope of the Act, the constitutional difficulty is avoided. Moreover, the latter alternative is the *only* plausible construction of the statute.

#### *h. Mineral Rights not Affected by Taylor Grazing Act*

It is absolutely clear that nothing in the Taylor Grazing Act authorizes the Secretary to classify or dispose of the *mineral estate* in federal lands. That applies to the surface estate only. Since 1897 the mineral resources of the United States have been subject to exclusive examination and "classification" by the United States Geological Survey (43 U.S.C. §31(a)).

It is absolutely clear that States are entitled to make school indemnity selections of mineral lands under 43 U.S.C. §852 if the base lands are mineral in character. It necessarily follows that the Secretary could not possess authority to "classify" school indemnity selections for disposition of the mineral estate under Section 7 of the Taylor Grazing Act. The lower court emphasized this observation at (586 F.2d at 767).

#### *i. School Indemnity Statutes Liberally Construed*

The lower court construed the school indemnity statutes in such a manner as to give meaning and effect to the congressional policies and purposes as set forth therein. The Secretary now urges this Court to reverse the lower court by construing the Taylor Grazing Act in an unreasonable and irrational fashion that would

frustrate and emasculate the indemnity grants which Congress made to the States.

While federal land grant statutes often are construed strictly in favor of the United States and against claimants to federal lands, that rule does not hold true with respect to school land grants. Speaking of the very indemnity provisions that are now under review, this Court said, in denying the Secretary discretion to reject a state's indemnity selection, that:

... it is of further significance that this court had recognized that the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively. *Beecher v. Wetherby*, 95 U.S. 517, 526; *Johanson v. Washington*, 190 U.S. 179, 183. (*Wyoming v. United States*, 255 U.S. 489, 508 (1921); see also 42 *Op. Atty. Gen.*, February 7, 1963).

#### j. Summary

At various places in its opinion the court below discussed and adopted virtually all of the arguments set forth above. Perhaps the most succinct portion of the opinion in this regard is where the court quotes with approval Conclusion of Law No. 6 of the trial court:

*Conclusion No. 6:* The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), *cannot reasonably be construed to require classification* of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative

history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act. (586 F.2d 764-765)

## VI. RESPONSE TO MISCELLANEOUS ARGUMENTS OF SECRETARY

### A. Alleged Congressional Acquiescence in "Classification" under Section 7

The Secretary makes repeated claims that the decision by the court below overturns a long standing administrative practice of the Department of the Interior that has been approved by Congress (Secretary's Brief, pp. 51 *et seq.*) The "practice" is "classification" of land under Section 7 of the Taylor Grazing Act to make it available for selection.<sup>20</sup> This argument is not persuasive.

The most compelling observation is that the Secre-

<sup>20</sup> The Secretary's position with respect to the date the public domain allegedly became "locked up" and immune from school indemnity selection is not entirely clear.

In the lower court it seemed that the Secretary relied on the date of April 15, 1930, which was the date of President Hoover's Executive Order No. 5327. Before this Court, the Secretary sometimes seems to argue for the date of June 28, 1934, which was the date that the Taylor Grazing Act became law; and at other times he seems to rely on June 26, 1936, which was the date that Section 7 of the 1934 act was amended.

But most of the time the Secretary's argument seems to be that the lands became "locked up" by Executive Order No. 6910, issued November 26, 1934, under authority of the Pickett Act and for the purpose of implementing the Taylor Grazing Act; and the Secretary then argues that the 1936 Amendment to Section 7 of the Taylor Grazing Act was necessary to provide for "classification" as a key to unlock the lands withdrawn by Executive Order No. 6910.

Therefore, throughout this brief it is assumed that the date of November 26, 1934, is the date at which the Secretary claims that all of the public domain located in the twelve States named in Executive Order No. 6910 became "locked up" and unavailable for school indemnity selection.



tary's argument is totally inconsistent with the true facts of this case. The Secretary's scheme in this case is not necessarily to "classify" land for school indemnity selection, but to apply, for the first time ever, a "comparative value" criterion in the "classification" process. This would be absolutely inconsistent with and contrary to the policy and practice of the Department of the Interior for more than a century, which has been to require equal acreage rather than equal value in school indemnity selections.

At page 15 of the Secretary's Brief, it is claimed that the Department of the Interior has "adhered steadily" to the comparative value test since 1965. But this is a most dubious claim. As the Court below noted so tellingly, the Secretary of the Interior has as yet been unable to articulate the method or manner by which such a comparative value test could even be implemented. 586 F.2d at 760.

As a matter of actual practice, at least in Utah, the Department of the Interior has considered the "classification" process to be the same as the ministerial adjudication under 43 U.S.C. §852, and such classification process has included no more than a determination as to whether school indemnity selections were in accordance with the statutory criteria of 43 U.S.C. §852.<sup>21</sup> As a result, any classification practice by the Department of the Interior has been essentially uncontroversial until the Department's recent announcement that it was going to implement a new criterion on comparative

<sup>21</sup> See affidavit of Charles R. Hansen as quoted in footnote 7, page . . . , *supra*.

value, even though such a criterion would be inconsistent with the provisions of 43 U.S.C. §852.

Even so, the Secretary's claim that Congress has approved any practice of classifying land for school indemnity selection under Section 7 if the Taylor Grazing Act is highly suspect.

First, as has already been demonstrated in considerable detail, the Taylor Grazing Act has no reasonable ambiguities with respect to school indemnity selections—it simply does not apply to such selections. The lower court was plainly correct in so holding. While Utah acknowledges that courts ordinarily accord some deference to an administrative interpretation of a statute by an agency charged with administration of the statute, that rule applies only where there is a "reasonable" basis in law for the agency's interpretation. The courts will not defer to an administrative interpretation that is not reasonable:

The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law" . . . But the courts are the final authorities on issues of statutory construction, . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . (*Volkswagenwerk v. FMC*, 391 U.S. 261, 272 (1968); citations in quote omitted).

See also *N.L.R.B. v. Brown*, 380 U.S. 290 (1965); *Moor v. County of Alameda*, 411 U.S. 743 (1973); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Circ. 1971).

Further, there is no persuasive indication that Congress ever really considered the Secretary's administrative interpretation of Section 7 of the Taylor Grazing Act. At pages 55-56 of his Brief, the Secretary cites two congressional committee reports which incorporate parts of letters sent by the Secretary to the congressional committees, reciting that amendments to 43 U.S.C. §852 would not change Section 7 of the Taylor Grazing Act or the Secretary's practice thereunder. But this appears to have been a perfunctory act by the congressional committees, since that issue was peripheral to the bills under consideration and there appears not to have been one word of discussion or debate—either on the floor of Congress or in committee hearings—to indicate whether school indemnity selections were or should be subject to secretarial classification under Section 7. Contrast this with the intense congressional attention and scrutiny given to school land grants and indemnification procedures, and the Secretary has advanced a very weak argument. It is entirely unreasonable to assume that Congress intended—even if it could lawfully do so—to emasculate the school trust grants without a single word of discussion or debate concerning such an emasculation.

A case which presented a much more persuasive

factual basis for judicial deference to congressional acquiescence in an administrative interpretation of a statute was recently decided by the United States Court of Appeals for the Ninth Circuit. In *United States v. Imperial Irrigation District*, 559 F.2d 509 (1977), it was held that the Secretary of the Interior's administrative interpretation of the excess lands provision (160-acre limitation) of the Omnibus Adjustment Act of 1926 was not binding or controlling on the courts. The lower court (322 F.Supp. 11) had held that an administrative decision of Secretary of the Interior Ray Lyman Wilbur, issued February 24, 1933, was binding on the court because (1) it had been followed consistently for nearly forty years, (2) the legislative history of the Omnibus Adjustment Act of 1926 supported the Secretary's opinion, (3) Congress repeatedly had been made aware of the Secretary's opinion and seemingly acquiesced in it, and (4) very substantial investments had been made by private parties in reliance on the Secretary's opinion.

Those facts and contentions were set forth in considerable detail at 322 F.Supp. 15-27. A careful review of those facts will demonstrate that there was genuine, active and repeated congressional acquiescence in the administrative interpretation. Nevertheless, the Ninth Circuit Court held that the Secretary's Opinion in 1933 was an incorrect interpretation of the law and would not be followed by the court:

... The appropriate deference to be accorded an administrative construction of a statute is that a 'consistent and longstanding' interpretation of

a Congressional enactment by an agency charged with administration of that statute is entitled to 'considerable weight' but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). (559 F.2d 509 at 439).

In short, in the Imperial Water controversy (1) a later Secretary of the Interior determined that a forty-year-old administrative opinion of a predecessor Secretary was in error and should be reversed, (2) the trial court said that the later Secretary of the Interior could not change the administrative interpretation adopted by the earlier Secretary, and (3) the Court of Appeals reversed, holding that an unfounded administrative interpretation would not be sustained by the courts, regardless of its antiquity. See annotation at 39 L.Ed.2d 952 *et seq.*

But, returning to the pertinent point, the only actual *practice* of the Department of the Interior for more than a century has been to process school indemnity selections on the basis of equal acreage rather than equal value—as required by 43 U.S.C. §852. Any so-called "classification" process under Section 7 of the Taylor Grazing Act has never departed from such equal acreage requirement. If Congress has actually approved any administrative practice of classification, it has been the practice of classifying school indemnity selections on the basis of equal acreage rather than equal value.

# B. *The Pickett Act and Executive Orders No. 5327 and 6910*

The Secretary argues that the lands selected by Utah in this case were not available for selection unless "unlocked" by classification under Section 7 of the Taylor Grazing Act because all unappropriated public domain in Utah had been withdrawn in 1934—and still remains withdrawn—for classification and examination by Executive Order No. 6910, issued under the Pickett Act. The Secretary also makes an unusual claim under Executive Order No. 5327, which will be explained in a moment.

The Pickett Act of June 25, 1910, was codified as 43 U.S.C. 141 prior to its repeal in 1976, and provided as follows:

The President may, at any time in his discretion, *temporarily withdraw from settlement, location, sale, or entry* any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (Emphasis added).

The Secretary argues that Executive Order No. 6910, made under authority of the Pickett Act, withdrew the land described therein so as to prevent school indemnity selections unless and until the land was classified as suitable for disposition under Section 7 of the Taylor Grazing Act. That order was issued by Presi-



dent Roosevelt on November 26, 1934, expressly identified the Pickett Act as authority for the order, and provided, in part, that:

... it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, . . . .

Thus, this executive order withdrew 100% of the "vacant, unreserved and unappropriated" public land in twelve Western States, for classification "of the most useful purpose to which said land may be put in consideration of the provisions" of the Taylor Grazing Act of 1934.

The Secretary now raises two legal questions by asserting that Executive Order No. 6910 prevents school indemnity mineral selections. The first is whether the Pickett Act authorized any withdrawals that would defeat school indemnity selections; and the second is whether Executive Order No. 6910 intended to withdraw lands from school indemnity mineral selection.

With respect to the first question, it will be noted that both the Pickett Act and Executive Order No. 6910 apply *only* to withdrawals from "settlement, location, sale or entry." There is no authority to withdraw from

school indemnity *selection*. Selections are not settlements. They are not sales. They are not entries. They are simply school indemnity selections that appear to be beyond the reach of the Pickett Act and Executive Order No. 6910 promulgated thereunder. But the lower court found it unnecessary to decide whether land withdrawals by virtue of an executive order promulgated under the Pickett Act conceivably could defeat school indemnity selections, because it was entirely clear to the court that Executive Order No. 6910 sought to accomplish no such purpose.

In his Petition, the Secretary pondered the question as to what kinds of withdrawals might prevent school indemnity selection:

What is not entirely clear . . . , however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection? (Secretary's Petition, p. 14).

In his Brief, the Secretary *assumes* that no special purpose reservation is required. But he cites only *Wyoming v. United States, supra*, to support this assumption. But that case dealt with a "special purpose" forest reservation—not with a withdrawal for classification without reservation for any federal purpose. Further, the *Wyoming* case sustained the validity of the school indemnity selection.

There can be no serious contention that Executive Order No. 6910 withdrew all of the unreserved public

domain in Utah from school indemnity selection. The Pickett Act, the source of authority for that Order, did not authorize withdrawals from school indemnity selection. Executive Order No. 6910, by its own terms, did not purport to withdraw land from school indemnity selection. Indeed, when the Solicitor of Interior ruled that Executive Order No. 6910 withdrew the public domain from *exchanges*, Congress expressed prompt disapproval, and, within five days after a Senate Committee began hearings on the Department's practice with respect to such exchanges, President Roosevelt amended Executive Order No. 6910 to make it clear that the rights of the States to trade or exchange land were unaffected by the Order. (See Section V.B. of this Brief, *supra*).

The Secretary offers a further curious argument as to why Executive Order No. 6910 might have locked up the public domain and made it unavailable for school indemnity selection. He notes that Executive Order No. 5327, issued by President Hoover on April 15, 1930, withdrew all lands containing deposits of oil shale for investigation, examination and classification, but then admits that such Order "did not effect the state indemnity selection process" because mineral indemnity selections were not authorized by Congress until 1958. (Secretary's Brief, p. 32). The Secretary's argument is that even though Congress specifically lifted this mineral withdrawal in 1958, it failed to lift the alleged withdrawal of Executive Order No. 6910. (Secretary's Brief, p. 53, n. 25). In short, the Secretary argues that the clear congressional declaration by Congress in 1958

(43 U.S.C. §852(d)(1)) that oil shale lands shall be subject to school indemnity selection actually means the exact opposite—that such lands shall not be subject to selection unless and until the Secretary says so because Congress allegedly neglected to nullify Executive Order No. 6910.

That argument is really strained, since, among other things, it is clear that Executive Order No. 6910 never applied to school indemnity selections. And the lower court was clearly unimpressed. Unable to swallow the Secretary's imaginative but fanciful arguments concerning the alleged reach, affect and relationship of Executive Orders No. 5327 and No. 6910, the lower court rejected them summarily:

Finally, we reach the Secretary's contention that classification is likely required under Executive Order 5327 issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders can be construed to apply to state school indemnity selections. (586 F.2d at 773).

### C. Alleged "Windfall" to States

The Secretary repeatedly claims or implies that Utah would receive a substantial windfall if the pending school indemnity selections are honored. (See, e.g., Secretary's Brief, pp. 15, 57 *et seq.*). This is not necessarily so. The basic federal purpose in granting to Utah

sections 2, 16, 32 and 36 in each township was to give the State a balanced and representative ownership on a statewide basis. This basic federal policy is admitted by the Secretary (Secretary's Brief, p. 14), and has always been well understood. When Congress was considering S. 2517, which became the 1958 Amendment to 43 U.S.C. §852, the Department of Interior reported to Congress that:

*In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965) (Emphasis added).*

Utah was granted four sections in each township, rather than the traditional two, because of the large areas of arid, barren desert. Title could not pass until the lands were surveyed. Surveys were delayed, and, in the meantime, the Federal Government reserved the choice areas for national parks (Utah has five national parks, which is more than any other State), national forests, reservoir sites, and other purposes. Lands that were near streams, or that were susceptible to irrigation or other development, were taken by private entry. Thus, by and large, when surveys were completed the school lands *in place* actually received by Utah were the remote and barren lands that nobody wanted, ordinarily having no value except for marginal grazing, and even today much of that land is leased for less than ten cents per acre per year. While Utah could

select indemnity lands for those valuable school sections lost by pre-emption and reservation, it could only select from the remaining "unappropriated" barren desert.

And a further inequity arose in 1918 when it was judicially determined that Utah was not entitled to receive school lands in place that were mineral in character. Utah's Enabling Act contained no such reservation or exclusion, but this Court reached that result because enabling acts of several other States excluded mineral lands from school grants. *United States v. Sweet*, 245 U.S. 563 (1918). Congress recognized and remedied this inequity in 1927 by providing that school land grants in place include mineral lands. Act of January 25, 1927, 44 Stat. 1026-1027.

Even so, States still could not select mineral lands as indemnity for mineral base lands until 1958, when Congress remedied this inequity by enacting 72 Stat. 928, amending 43 U.S.C. §852. That statute contains the congressional criteria for "fair value" based on an "equal acreage" compensation in indemnity lands. Thus, for decades the Government short-changed the school land grants to the States under the bilateral compacts, but Congress in a step-by-step manner corrected these deficiencies. Congress certainly must have been aware of the fact that at times lands selected as school indemnity would exceed the value of the base lands, just as in numerous cases the value of the base lands had exceeded that of the selected lands.

When Utah was compelled to select lands as indemnity for sections in place having a value much high-



er than the selected lands, the Secretary never objected on the ground that Utah was being short-changed. Even now, under the Secretary's new policy on comparative value, he has a totally one-sided view. The Secretary desires to reject mineral land indemnity selections when the selected land is more valuable than the base mineral lands—but the Secretary is perfectly willing to approve selections where the base lands are more valuable than the selected lands—and, in that event, the Secretary seems to claim that he cannot make any adjustment to compensate the State for the federal windfall—because, the Secretary argues, once he has “unlocked” the public domain by approving lands as suitable for school indemnity selection, he then is bound by the “equal acreage” provisions of 43 U.S.C. §852.

Another odd implication advanced by the Secretary is that if land has value, it should be owned by the United States. In footnote 2 at page 4 of his Brief, the Secretary claims that there is a total of 643,000 acres of outstanding school indemnity selection rights held by seven States. This is less than one-tenth of one percent of the federal land. See *One Third of the Nation's Land, A Report to the President and to the Congress by Public Land Law Review Commission*, p. x, 1970. Utah is listed in said footnote 2 as having 225,000 acres—which assumes that none of Utah's present selections are valid. Even so, 225,000 acres represents only slightly more than one-half of one percent of the federal land in Utah—the Federal Government still owns two-thirds of the State. (*One Third of the Nation's Land, supra*, p. 327).

The Secretary asserts that the decision below “will prove quite costly to the United States.” (Secretary's Petition, p. 10). To reinforce this notion the Secretary advises that Colorado “presumably” will now be able to select the lands in that State on which prototype oil shale leases have been issued and where the lessees are obligated to pay \$328 million in bonus payments. (Secretary's Petition, pp. 10-11, and footnote 7 on page 11 of said Petition). This is highly misleading.

Under the clear holding of the court below, no rights attach on the part of a selecting State prior to the date of selection, and Colorado had not selected any lands prior to issuance of the prototype leases. The Colorado lessees have already paid to the United States the full amount of the bonus bid required to be paid in cash (60%); the remaining amount (40%) may be credited against development costs, as provided in the leases. Thus, if Colorado could have selected those lands at all—and there is some question if it could—the selection could not be effective until the termination of the existing leases, and the State would not directly receive any of the lease revenues.

And the unfounded fear of the Secretary is now moot. On September 4, 1979, Colorado exercised its entire remaining entitlement of school indemnity rights to mineral land by selecting 6,840 acres of oil shale lands in Rio Blanco County. Colorado did not select any part of the land covered by the federal prototype leases.

Does the United States have to own all of the nation's oil shale resource any more than it has to own all of the nation's farms? The estimated oil shale deposits in Colorado, Utah and Wyoming consist of 11,000,000 acres. Of this, 7,870,000 acres are owned by the United States and the balance of 3,130,000 acres are owned by private parties, Indians, and the three States. The United States owns and the Department of the Interior administers 72 percent of the total oil shale acreage. But that is a misleading figure.

Actually, the United States owns a much larger share of the resource. The total estimated shale oil reserves in the three States are slightly more than 4 trillion barrels. However, the amount of oil that might be recovered economically is estimated to be considerably less, consisting of a total of 620 billion barrels, with 500 billion in Colorado, 90 billion in Utah, and 30 billion in Wyoming. If the School indemnity selections of both Utah and Colorado are honored, they will embrace less than one-half of 1 percent of the total estimated reserves and less than 1 percent of the high-grade reserves that might be economical to produce. The United States would still own nearly 80 percent of the high-grade oil shale. See Environmental Impact Statement for Federal Prototype Leasing Program, Vol. I, pp. II-102 *et seq.*, tables II-16, II-17 and II-18, and Figure II-31 (Dept. of the Interior, 1973); and Synthetic Fuels Data Handbook, 2d. ed., p. 13 (Cameron Engineers, Denver, Colorado, 1978).

Moreover, there is no evidence that oil shale lands are more valuable than the original grants in place. While there has been an interest in oil shale development for more than sixty years, the fact is that not one gallon of shale oil has yet been produced at a profit, and there is no assurance that one ever will be. On the other hand, land appropriated in Utah before statehood and survey (where Utah was denied title) included some of Utah's most valuable metals and hydrocarbons.

#### *D. The Secretary Obfuscates the Issue*

The central issue in this litigation is whether the Secretary has authority to reject school indemnity selections because the Secretary believes the selected land is more valuable than the base lands for which selection is made.

The trial court found the answer to this question to be very clear from the relevant statutes and decisions of this Court. And so did the Court of Appeals. But the Secretary has endeavored to obscure both the issue and the answer in a complicated and largely irrelevant mix and maze of miscellaneous material. Indeed, the Secretary begins his Argument (Secretary's Brief, p. 16) in the following manner:

Resolution of the central question presented in this case requires the Court to review a complex amalgam of statutes, executive orders, judicial decisions, and administrative interpretations bearing on the state indemnity selection program. The current legal situation cannot be fully under-

stood without a review of the historical antecedents of the statutory authority that the states now enjoy to select mineral lands in certain circumstances.

Utah submits that this case is not so complicated. The school land grant program, derived from a bilateral compact between sovereigns, created a solemn public trust that cannot lightly be swept away by reference to a bunch of obscure and vague bits and pieces of the administrative practice of the Department of the Interior over a century and a half. The Secretary weaves and sutures a fabricated pattern that suggests—at the most—that the Secretary sometimes did and sometimes didn't claim authority to exercise discretion over school indemnity selections.

But after the arduous ordeal of carefully following the Secretary's legal hypotheses is over—one fact remains absolutely clear: Never—not once—during the 150 years of public land law scrutinized by the Secretary, has the Secretary applied a comparative value criterion to school indemnity selections. To this very day, every school indemnity selection in the history of this Nation has been on the basis of equal acreage.

That is the central issue in this case. That is the only issue in this case. Utah's school indemnity selections have been pending for fifteen years and the Secretary has advanced no objection other than his desire to replace the congressionally mandated equal acreage criterion with his self-created equal value criterion.

## CONCLUSION

It is respectfully submitted that the decision of the lower court should be affirmed.

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**CERTIFICATE OF SERVICE**

I, Robert B. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that two copies of the foregoing Brief by the State of Utah were served upon each of the following: Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; George Deukmejian, Attorney General of the State of California, 555 Capitol Mall, Suite 350, Sacramento, California 95814; David H. LeRoy, Attorney General of the State of Idaho, State House, Boise, Idaho 83720; and Frank J. Allen, Attorney at Law, Clyde & Pratt, 351 South State Street, Salt Lake City, Utah 84111, by mailing the same, postage prepaid, this 9th day of October, 1979, all in accordance with the Rules of this Court.

**ROBERT B. HANSEN**

Utah Attorney General

**MOTION FILED**  
**AUG 17 1979**

IN THE  
**Supreme Court of the  
United States**

OCTOBER TERM 1978

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No. 78-1522

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CECIL D. ANDRUS, Secretary of the Interior,  
*Petitioner,*

v

THE STATE OF UTAH,  
*Respondent.*

---

On Writ of Certiorari to the United States Court  
of Appeals for the Tenth Circuit

---

Motion for Leave to Intervene or, in the Alternative, to  
File Brief Amicus Curiae and Brief for the  
Ute Indian Tribe of the Uintah and Ouray Reservation  
— Intervenor or Amicus Curiae

---

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August 1979

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v

THE STATE OF UTAH,  
*Respondent.*

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On Writ of Certiorari to the United States Court  
of Appeals for the Tenth Circuit

---

**MOTION FOR LEAVE TO INTERVENE OR,  
IN THE ALTERNATIVE, TO FILE BRIEF  
AMICUS CURIAE**

The Ute Indian Tribe of the Uintah and Ouray  
Reservation (herein "the Tribe"), hereby respectfully  
moves the Court for leave to intervene herein or, in the  
alternative, to file the attached brief amicus curiae in  
this case.

The consent of the attorney for the Petitioner Sec-  
retary of the Interior for appearance as amicus curiae  
has been obtained as evidenced by the letter filed here-  
with. The consent of the attorney for the Respondent  
State of Utah has been requested but was refused.

The Tribe believes, however, that as a political entity existing pursuant to federal law (25 U.S.C. §476) (Appendix A), such consent to appear as amicus curiae is not required under Rule 42(4) of the Rules of the Supreme Court.

The interest of the Tribe in this case arises as follows:

1. The Tribe is a federally recognized American Indian Tribe organized under federal law (25 U.S.C. §476) (Appendix A), and duly recognized as such by the Defendant Secretary of the Interior.

2. This case involves the right of the State of Utah to make school land grant indemnity selections in lands which the Tribe claims are a part of its existing Indian reservation lands. Under Utah's Enabling Act (Appendix B), Utah may not make indemnity selections within an Indian reservation.

3. Such Indian reservation lands, historically known as the Uncompahgre Reservation and presently a part of the Tribe's Uintah and Ouray Reservation, were established as an Indian Reservation by the Executive Order of January 5, 1882 (I Kappler 901) (Appendix C), and opened to non-Indian location and entry by the Act of June 7, 1897, 30 Stat. 62 at 87 (Appendix D). Said 1897 Act further specifically reserved all of the hydrocarbon mineral lands in the Reservation to the United States.

4. The Tribe claims that such opening to non-Indian settlement did not terminate or otherwise affect the

reservation status of such Reservation in accordance with the principles laid down by this Court in the cases *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

5. The precise question of whether or not the Uncompahgre Reservation lands have retained their Indian reservation status is presently pending before the United States District Court for the District of Utah in the case *The Ute Indian Tribe v. The State of Utah, et al.*, Civil Action No. C-75-408. The question of whether or not the lands in question are unavailable for selection by the State as the result of the reservation of the mineral lands in the 1897 Act was apparently not considered herein below.

6. Counsel for the Secretary of the Interior, including attorneys in both the Justice and Interior Departments, have been aware of the pendency of the action in the Utah District Court and the involvement of the Uncompahgre Reservation issue therein since October of 1975, but have apparently failed and refused to raise any issue regarding the Uncompahgre Reservation in this case, notwithstanding the government's fiduciary obligation to the Tribe to protect its reservation lands and interests.

7. The undersigned counsel for the Tribe has just become aware of the potential adverse impact that a decision in favor of the State of Utah by this Court in this case would have in the pending litigation to



determine the status of the Uncompahgre Reservation. Neither the State of Utah nor the Secretary of the Interior has heretofore sought to either join the Tribe as a party herein or to apprise the Tribe of the impact and effect this case would have on the Tribe's property rights or on the litigation pending since October of 1975 to determine the reservation status issue.

8. If these proceedings are remanded as requested in the attached brief, the determination of the status of the Uncompahgre Reservation in the pending litigation before the Utah Federal District Court will have a critical, even determinative, effect on the outcome of this case. If the lands in question on which the State of Utah seeks to make its school land indemnity selections are either specifically reserved to the United States or are contained within a continuing Indian reservation, they are not available for such selections by the State.

Respectfully submitted,

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# In the Supreme Court of the United States

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OCTOBER TERM 1978

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No. 78-1522

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CECIL D. ANDRUS, Secretary of the Interior,  
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THE STATE OF UTAH,  
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On Writ of Certiorari to the United States Court  
of Appeals for the Tenth Circuit

---

BRIEF OF THE UTE INDIAN TRIBE OF  
THE UINTAH AND OURAY RESERVATION  
— INTERVENOR OR AMICUS CURIAE

---

## INTEREST OF THE UTE TRIBE

The Ute Indian Tribe of the Uintah and Ouray Reservation (herein referred to as the "Tribe") is a federally recognized American Indian Tribe, organized pursuant to federal law (25 U.S.C. §476) (Appendix A), and within the general guardianship of the United States over Indian Tribes. The Tribe inhabits an In-

dian reservation in northeastern and east-central Utah known as the Uintah and Ouray Reservation. That Reservation is composed of the combined historic Uintah and Uncompahgre\* Indian Reservations. All of the school land grant indemnity selections in issue in this case between the Secretary of the Interior and the State of Utah are located within the boundaries of the Uncompahgre Reservation and are a part of the Tribe's Uintah and Ouray Reservation.

The specific question of whether or not the Uncompahgre Reservation is a continuing Indian Reservation and presently a part of the existing Uintah and Ouray Reservation is presently in litigation before the United States District Court for the District of Utah. That action was filed in October of 1975 and is entitled the *Ute Indian Tribe v. The State of Utah, et al.*, Civil No. C-75-408. Trial in that case was held on August 1-2, 1979. It was not until that trial that the Tribe realized the potentially adverse effect which the decision herein could have on its claims regarding the Uncompahgre Reservation.

There is an urgent need for the Court to consider the matters set forth herein. The Defendant Secretary of the Interior has the ultimate statutory responsibility for "the management of all Indian affairs and of all matters arising out of Indian realtions" (25 U.S.C. §2) (Appendix E). The attorneys for the Secretary of the Interior, both in the Department of Justice and in the Department of the Interior, have been aware of the

\* The Indian Department Agency for the Uncompahgre Reservation was originally located at a place called "Ouray" within the Reservation.

pendency of the *Ute Indian Tribe* case, *supra*, and of the Tribe's claim of reservation status for the Uncompahgre Reservation since at least October of 1975. Notwithstanding such knowledge and their statutory and fiduciary obligations to the Ute Tribe to represent its interests in pending litigation (*see* 25 U.S.C. §175) (Appendix F), the Defendant Secretary of the Interior has never raised, acknowledged, or defended the interests of the Ute Indian Tribe in this litigation or asserted reservation status for the lands in question as a defense.

Similarly the attorneys for the State of Utah herein (Messrs Dewsnap and Jensen), are the same attorneys involved in the defense for the State of Utah of the Tribe's claim for reservation status of the Uncompahgre Reservation in the *Ute Indian Tribe* case, *supra*. Notwithstanding the pendency of that action and their knowledge thereof, and of the Tribe's claims therein, the State of Utah has never sought to join the Tribe as a party herein or to apprise either the District Court or counsel for the Tribe of the overlapping nature of the issues and the potential effect of this case on the *Ute Indian Tribe* case.

Attorneys for both the State of Utah and the United States submitted amicus briefs to this court in a prior case involving the boundaries and status of the Uintah and Ouray Reservation. See *Appawora v. Brough*, No. 76-815, vacated and remanded at 431 U.S. 901 (1977).

As will be developed below, the Tribe claims not only that the lands in question herein are *not* available

for State indemnity selections as the result of those lands being within the Tribe's Indian reservation, but claims that the Tribe has an interest in any mineral development thereon. The Tribe's interests are not being adequately protected by the existing parties.

### SUMMARY OF ARGUMENT

1. That the lands in question are not available for selection by the State of Utah as school land grant indemnity selections as the result of their being within a continuing federal Indian reservation and being subject to a specific statutory reservation in the United States.

2. That this matter should be remanded to the District Court not only to determine the questions related to Indian reservation status which have not been heretofore raised by the parties, but to allow the Tribe to defend its interests which the Defendant Secretary of the Interior has failed to defend.

### ARGUMENT

#### I

#### THE LANDS IN QUESTION ARE NOT AVAILABLE FOR SCHOOL LAND GRANT INDEMNITY SELECTIONS BECAUSE THEY ARE WITHIN AN EXISTING FEDERAL RESERVATION.

The school land grant selections in issue herein are located within the boundaries of the Uncompahgre Indian Reservation (the "Reservation"). While the State of Utah has disputed the continuing reservation status

of that area in the pending litigation before the Utah Federal District Court, that issue remains unresolved. The consistent decisions of this Court, however, have established the principle that Indian reservation status is presumed to continue unless and until terminated by Congress by clear, specific, and unambiguous legislative action. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The Uncompahgre Reservation was created by Executive Order on January 5, 1882 (I Kappler 901) (Appendix C). By the Act of August 15, 1894 (28 Stat. 286 at 337) (Appendix G), Congress attempted to open the Reservation lands to non-Indian entry under the "homestead and mineral laws of the United States," but only after the selection of allotment lands for the Ute Indians and the issuance of a proclamation. The 1894 Act was never implemented because the Indians would not voluntarily accept the allotments and the required proclamation was never issued.

Since the 1894 Act was not implemented, Congress passed the Act of June 7, 1897 (30 Stat. 62 at 87) (Appendix D), again directing the making of allotments to the Indians and providing for the opening of the unallotted lands to entry under the public land laws. No mention is made in either act of express language of disestablishment, which language this Court has required to support a finding of reservation termination in the *DeCoteau* and *Rosebud* cases, *supra*. Indeed, the language



used by Congress is very similar in form and effect to the language determined by this Court *not* to have resulted in reservation termination in the *Mattz* and *Seymour* cases, *supra*. The legislative history and surrounding circumstances of the 1894 and 1897 Acts similarly do not support a finding of reservation disestablishment.

Many other facts, being fully developed in the litigation now pending in the Utah Federal District Court, support a finding of continued reservation status for the Reservation. Interestingly, such evidence includes the Constitution and Bylaws of the Tribe, adopted pursuant to 25 U.S.C. §476 (Appendix A) *and approved by the Secretary of the Interior in 1937*, which recognizes the continuing existence of the Uncompahgre Reservation by extending Tribal jurisdiction under the Tribal Constitution throughout that reservation area. See Appendix H. As revealed by the District Court's decision herein, it was not until 1965 that the State first sought to obtain the Uncompahgre Reservation lands.

It is further important to note that the 1897 Act, *supra*, which opened the Reservation, expressly *reserved* to the United States hydrocarbon mineral lands in the Reservation.

And the title to all of the said [unallotted] lands containing gilsonite, asphaltum, elaterite, *or other like substances* is reserved to the United States. (30 Stat. at 87.) (Appendix D)  
[Emphasis added.]

As far as the Tribe can determine, the effect of the 1897 Act, including its continuing reservation of mineral lands, has not been considered by the courts

below. It is clear from the legislative history of the 1897 Act that oil shale lands, such as those selected by the State of Utah, and are included in the phrase "other like substances" in connection with gilsonite, asphaltum and elaterite in the 1897 Act. See, e.g., Senate Document No. 161, 54th Congress, 1st Session, dated March 11, 1896, consisting of a letter from the Secretary of the Interior to the Congress, with attached report, in response to a request from Congress for information as to why the Uncompahgre lands were not opened under the 1894 Act, *supra*.

In response to said resolution, I have the honor to call your attention to pages 10 and 37 of my annual report . . . a copy of which I herewith transmit. That report sets forth the fact that valuable discoveries of "gilsonite" have been explored by officers of the Geological Survey on this reservation since the date of passage of [the 1894 Act] and shows that if these lands are opened to entry in the ordinary way the Government would be deprived of extensive profits which should go into its Treasury.

. . . .

[Extract from Annual Report . . . p. 37]  
*Mineral deposits on the Uncompahgre Reservation. . .*

The *bituminous shale*, sandstone, and limestone might be of commercial value under favorable conditions for transportation. Practically the same materials elsewhere are employed either for paving purposes or made to yield up their hydrocarbons as commercial oils. p. 1-2.

[Second emphasis added.]

Even without the Indian reservation issue, there is a substantial question, apparently unaddressed in this

case thus far, as to whether or not the above quoted reservation of mineral *lands* in the 1897 Act is overcome by 43 U.S.C. §§851, 852. The State of Utah relies upon 43 U.S.C. §§851, 852 to select mineral lands from the "unappropriated public lands" of the United States as in lieu or indemnity school selections. The in lieu selections of the State are limited to areas of "unappropriated public lands," a phrase defined in 43 U.S.C. §852(d)(1) (Appendix I) as falling into three specific groups. The first group includes those lands withdrawn for oil shale, but "otherwise subject to appropriation, location, selection, entry or purchase under the non-mineral laws of the United States"; the second group includes lands withdrawn by Executive Order Numbered 5327 "if otherwise available for selection"; and the third, contains those lands "which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals."

The lands chosen by the State do not fall into any of the three groups defined by 43 U.S.C. §852(d)(1) as being "unappropriated public lands." The State selections are not Group 1 because they are specifically exempted from public appropriation, location or entry by the 1897 Act. Clearly, the State selections are not in Group 2 by reason of their not being withdrawn by Executive Order Numbered 5327. Further, the lands are not "otherwise available" since they are specifically reserved by the United States under the 1897 Act. Group 3 includes only those lands in which the surface interest has been previously "disposed of," the United States retaining the subsurface or mineral interest only. Again, this group does not include the State selections

since the entire fee, subject to the beneficial interest of the Ute Indians, has been reserved in the United States by the 1897 Act. The lands selected by the State do not fit into the statutory definition of "unappropriated public lands" as set out in 43 U.S.C. §852(d)(1) and the selections are, therefore, void.

If the lands in question are within a continuing federal Indian reservation or otherwise specifically reserved, they are not subject to selection by the State, and the fundamental issue before the Court regarding those selections should be decided against the State. The Utah Enabling Act, Act of July 16, 1894, 28 Stat. 107 at 109, Section 6, provides as follows:

SEC. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in *permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act* until the reservation shall have



been extinguished and such lands be restored to and become a part of the public domain.  
(Appendix B) [Emphasis added.]

This case should be remanded to the District Court for a determination of the reservation status issue in connection with the pending litigation between the Tribe and the State of Utah, *The Ute Indian Tribe v. The State of Utah, et al.*, Civil No. C-75-408, U.S. District Court for the District of Utah.

## II

### THE INTEREST OF THE UTE TRIBE IN ITS RESERVATION AND THE RESOURCES THEREIN SHOULD NOT BE PERMITTED TO BE LOST BY THE FAILURE OF THE SECRETARY OF THE INTERIOR TO PROTECT TRIBAL INTERESTS.

The interest of the Tribe herein extends beyond merely defending the territorial integrity of its Reservation. The actions of the State and the Secretary in the court below in stipulating to the beginning of hydrocarbon development on the tracts in issue, and to depositing the monies derived therefrom in Court, are apparently an attempt to defeat the substantial, potentially overriding interest of the Tribe. Those proceeds, should the continued reservation status of the Uncompahgre Reservation be sustained in the court below in the *Ute Indian Tribe* case, would belong to the Tribe. See 25 U.S.C. §398b which provides as follows:

The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive

order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: PROVIDED, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

Thus, if the Tribe should prevail on the reservation status issue, all of the funds now on deposit in the registry of the District Court below (see Findings of Fact, Conclusions of Law and Decree dated June 8, 1876, (First) Finding No. 5, pp. 6-7), derived from hydrocarbon leases on the lands in issue within the Uncompahgre Reservation, will, by federal law, be required to be deposited in the Federal Treasury to the credit of the Ute Tribe and be administered as provided in 25 U.S.C. § 398b. Any final decision by this Court at this time, before the Tribe has had an opportunity to assert in the District Court its interest in those funds and to have the reservation status issue considered in the context of this case, would result in the possible loss by the Tribe of those funds and necessitate additional litigation against either the State or the Federal Government to recapture those funds.

This case should be remanded so that the Tribe does not suffer as the result of the failure of the Secre-



tary of the Interior to fulfill his duty to protect the interests of the Tribe in its reservation lands.

### CONCLUSION

Until very recently the Tribe was unaware that the State of Utah was apparently attempting to adversely affect the pending *Ute Indian Tribe* case, *sub silentio*, by failing to disclose to the court and counsel for the Tribe the overlapping nature of the issues involved herein. The Secretary of the Interior has failed to raise the seemingly obvious, potentially dispositive defense of reservation status which might, however, defeat the claim of the United States to the money on deposit with the lower court.

The Tribe respectfully submits that the just and proper resolution of this matter requires that all proceedings be remanded to the District Court for consideration of the reservation status issue and of the rights and interests of the Ute Indian Tribe in the subject lands.

Respectfully submitted,

Stephen G. Boyden  
Scott C. Pugsley  
Attorneys for the Ute Indian Tribe  
1000 Kennecott Building  
Ten East South Temple  
Salt Lake City, Utah 84133

(801) 521-0800

### PROOF OF SERVICE

This is to certify that three true and correct copies of the foregoing have been mailed, postage prepaid, on this the 16th day of August, 1979, to each of the following:

Richard L. Dewsnup  
Assistant Utah Attorney General  
Room 301  
231 East 4th South  
Salt Lake City, Utah 84103  
and to the  
Solicitor General  
Department of Justice  
Washington, D.C. 20530

---

Scott C. Pugsley

## APPENDIX A

## 25 U.S.C. § 476

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such

tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

B-1

APPENDIX B

Utah Enabling Act  
Act of July 16, 1894  
28 Stat. 107 at 109  
Section 6

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

C-1

APPENDIX C

Executive Order of January 5, 1882

I Kappler 901

*Uncompahgre Reserve*

EXECUTIVE MANSION, *January 5, 1882.*

It is hereby ordered that the following tract of country, in the Territory of Utah, be, and the same is hereby, withheld from sale and set apart as a reservation for the Uncompahgre Utes, viz: Beginning at the southeast corner of township 6 south, range 25 east, Salt Lake meridian; thence west to the southwest corner of township 6 south, range 24 east; thence north along the range line to the northwest corner of said township 6 south, range 24 east; thence west along the first standard parallel south of the Salt Lake base-line to a point where said standard parallel will, when extended, intersect the eastern boundary of the Uintah Indian Reservation as established by C. L. Du Bois, United States deputy surveyor, under his contract dated August 30, 1875; thence along said boundary southeasterly to the Green River; thence down the west bank of Green River to the point where the southern boundary of said Uintah Reservation, as surveyed by Du Bois, intersects said river; thence northwesterly with the southern boundary of said reservation to the point where the line between ranges 16 and 17 east of Salt Lake meridian will, when surveyed, intersect said southern boundary; thence south between said ranges 16 and 17 east, Salt Lake meridian, to the third standard parallel south; thence east along said third standard parallel to the eastern boundary of Utah Territory; thence north along said boundary to a point due east of the place of beginning; thence due west to the place of beginning. CHESTER A. ARTHUR.



D-1

APPENDIX D

Act of June 7, 1897

30 Stat. 62 at 87

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States.

E-1

APPENDIX E

25 U.S.C. § 2

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

F-1

APPENDIX F

25 U.S.C. § 175

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

G-1

APPENDIX G

Act of August 15, 1894

28 Stat. 286 at 337

Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompaghre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows:

"Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided*, That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location:" *And provided*, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the Gov-

ernment. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as here-matter provided.

Sec. 21. That the remainder of the lands on said reservation, shall, upon the approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: *Provided*, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances. *Provided*, That after three years actual and continuous residence upon agricultural lands from date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

## EXHIBIT H

CONSTITUTION AND BY-LAWS OF THE  
UTE INDIAN TRIBE OF THE  
UINTAH AND OURAY RESERVATION

## PREAMBLE

We, the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands hereafter to be known as the Ute Indian Tribe of the Uintah and Ouray Reservation, in order to establish a more responsible tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule, not inconsistent with the Federal, State and local laws, do ordain and establish this Constitution for the Ute Indian Tribe of the Uintah and Ouray Reservation.

## ARTICLE I—TERRITORY

The Jurisdiction of the Ute Indian Tribe of the Uintah and Ouray Reservation shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861 and January 5, 1882, and by the Acts of Congress approved May 27, 1902, and June 19, 1902, and to such other lands without such boundaries as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

. . . .

(Approved by the Secretary of the Interior on January 19, 1937)



## EXHIBIT I

## 43 U.S.C. § 852(d)(1)

The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

No. 78-1522

Supreme Court, U. S.  
**FILED**

SEP 25 1979

MICHAEL RODAK JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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CECIL D. ANDRUS, SECRETARY OF THE  
INTERIOR, PETITIONER

*v.*

STATE OF UTAH

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

**MEMORANDUM FOR THE PETITIONER IN RESPONSE  
TO THE MOTION OF THE UTE INDIAN TRIBE**

---

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**MEMORANDUM FOR THE PETITIONER IN RESPONSE  
TO THE MOTION OF THE UTE INDIAN TRIBE**

---

This memorandum is filed in response to the submission of the Ute Indian Tribe. In its motion and supporting brief, the Tribe ultimately urges that the case now be remanded to the district court for consideration of issues not previously argued or decided. We oppose that suggestion, believing that this Court properly may hear and determine the questions as to which certiorari was granted without further proceedings below.

(1)

1. The short answer to the Tribe's Motion is that the matters raised there are wholly discrete from the issues now before this Court, and that the Court's decision of the questions framed here (and already briefed by the United States) will in no way prejudice the Tribe's claims. If the United States prevails, the Tribe's objections will likely be mooted since Secretary Morton indicated that the State's "selections involve lands of grossly disparate values, within the meaning of the Department's policy" (A. 61). On the other hand, if Utah succeeds here and the judgment of the court of appeals is affirmed, there will be ample opportunity to consider the Tribe's objections before any selections are finally approved.<sup>1</sup> In that event, this Court might appropriately note that its decision leaves open the matters now advanced by the Tribe's Motion.

Several considerations counsel this course. First, the Court has granted certiorari and the United States has already filed its brief on the merits. After so long, the State of Utah is understandably impatient to have a definitive answer. Moreover, as the Court evidently recognized in agreeing to review

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<sup>1</sup> Indeed, even if the Secretary enjoys no discretion in the matter, the administrative adjudication of the selections requires several determinations to be made. It must first be ascertained that the "base" lands claimed to have been lost were in fact unavailable and, if the lieu lands selected in their stead are mineral in character or are located on a known geologic structure, that the base lands were in a like category. See 43 U.S.C. 852(a) (1), (2). If those conditions are satisfied, it must yet be determined that the lieu lands are not specifically reserved, appropriated or disposed of.

the case, the issues presented are of recurring importance. Whatever the fate of the particular selections immediately involved, the dispute over the proper construction of the school indemnity selection statutes and the Taylor Grazing Act will persist with respect to other state selections in Utah, Idaho, Colorado, and four other States.<sup>2</sup> By contrast, the narrow issues sought to be introduced by the Ute Tribe are confined to lands within the original boundaries of the Uncompahgre Reservation. Postponing resolution of the larger questions must invite wasteful duplicative litigation.

Even so, the Court might be inclined to defer consideration of the questions presented on certiorari if it were clear that threshold objections would moot those questions in this case, or would be likely to do so. But that is not a realistic probability. Although we do not wish to characterize the Tribe's arguments as wholly frivolous, it is fair to say that the obstacles in the way are numerous and substantial. We urge the Court not to alter its normal procedures on that account.

2. The Tribe's primary point is that the lands selected by Utah in lieu of lost school sections are located within the boundaries of the Uncompahgre Indian Reservation as defined by an Executive Order of January 5, 1882 (Tribe's Motion C-1). That ap-

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<sup>2</sup> The State of Idaho has participated *amicus curiae* in these proceedings because its indemnity selections may likewise violate the Department's gross disparity standard. We are advised that the State of Colorado has recently filed indemnity selections covering approximately 6,800 acres of oil shale lands.

pears to be correct. It is then said, again correctly, that the question whether the named Reservation remains effective, or has been terminated, is an issue in separate proceedings between the Tribe and the State now pending before the district court. In those circumstances, the Tribe submits, it would be inappropriate for this Court to render a decision expressly or impliedly premised on the disestablishment of the Reservation.

The solution, as we have already said, is for this Court to add to its decision an explicit disclaimer of any ruling on the reservation status of the lands in dispute. The Court need intimate no opinion on that question. Yet, in determining its present procedure, the Court should be advised that, in the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.

The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. Of course, we may be wrong. But the Court perhaps may accord some weight to the assessment of government officials who, although not insensitive to their special responsibility to support tribal claims, find themselves unable to do so in this instance.<sup>3</sup>

<sup>3</sup> Insofar as the Tribe suggests that the Department of Justice has an absolute duty to assert or support any claim advanced by an Indian Tribe, we reject that proposition. See *United States v. Mason*, 412 U.S. 391, 398-400 (1973). The United States has, in this Court, supported the claim

We simply list some of the impediments to the Tribe's claim: (1) Both in the abortive 1894 Act (Tribe's Motion G-1) and in the 1897 Act (Tribe's Motion D-1), Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to in legislation as "the former Uncompahgre Indian Reservation" (Act of March 1, 1899, ch. 324, 30 Stat. 924, 940; Act of March 3, 1903, ch. 994, 32 Stat. 982, 998, App., *infra*, 1a); (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter Reservation still subsisted (Act of March 11, 1948, ch. 108, 62 Stat. 72); (4) in the same Act (Section 2, 62 Stat. 77), Congress once again referred to the area as "the former Uncompahgre Indian Reservation" and nothing since 1948 indicates any Congressional change of mind; (5) in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the

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of the Ute Tribe that the Uintah and Ouray Reservation, as originally defined, has not been disestablished or diminished. See Memorandum for the United States as Amicus Curiae in No. 76-815, *Appawora v. Brough*, vacated and remanded, 431 U.S. 901 (1977). And the Department has determined to take the same position in the presently pending district court proceedings. But the government does not propose to support the Tribe insofar as it asserts the continued existence of the Uncompahgre Reservation.



United States to provide the Uncompahgre Band with a permanent Reservation (*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, 14 Ind. Cl. Comm. 707); and (6) at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence. Perhaps these hurdles can be overcome. But, for us, the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists. See *De Coteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

3. In fact, however, it seems wholly irrelevant whether the Uncompahgre Reservation subsists or not. To be sure, the general school indemnity selection statutes, 43 U.S.C. 851-852 (Pet. Br. 2a-7a), and the relevant provision of the Utah Enabling Act, ch. 138, Section 6, 28 Stat. 109 (Tribe's Motion B-1), both forbid the selection of lands "embraced in Indian \* \* \* Reservations." But we do not believe that prohibition applies to reservation acreage which has been unconditionally opened for entry under the general land laws, without any restriction or obligation on the part of the government to pay over or apply the proceeds of sale to the benefit of the Tribe. In those circumstances, the lands are effectively restored to the public domain and there is no reason to distinguish between entry or selection by individuals who are non-Indians and the State itself when satisfying its lieu selection rights. In such a case, the rationale of decisions like *Minnesota v. Hitchcock*, 185 U.S.

373 (1902), and *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), is inapplicable and the policy underlying 43 U.S.C. 856 is controlling.<sup>4</sup> See *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 601 nn. 23 & 24.

Viewed in the light most favorable to the Tribe, that is the situation here. Indeed, as the Tribe's brief recites, except for certain mineral lands (discussed below), all the unallotted acreage within the Reservation was, by the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (Tribe's Motion D-1),<sup>5</sup> "open[ed] for location and entry under all the land laws of the United States," without any conditions attached or trust imposed on the United States. Of course, this opening was later qualified by the general with-

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<sup>4</sup> Section 856 provides:

Any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under law existing prior to March 2, 1895, may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

The statute is not strictly applicable here because the United States did not "purchase" the surplus lands, treating them, rather, as simply restored to the public domain. But the provision illustrates the congressional policy of permitting (and sometimes preferring) state indemnity selection of surplus Indian Reservation lands when no payment to the Tribe is, in any event, contemplated.

<sup>5</sup> As the Tribe correctly recounts, an earlier "opening up" statute was not carried out. See Act of August 15, 1894, ch. 290, Sections 20-21, 28 Stat. 337 (Tribe's Motion G-1 to G-2).

drawal order of 1934 and the inclusion of the lands within a grazing district, but the effect of these actions on state indemnity selection presumably is the same whether or not the lands are within an Indian Reservation. It is not suggested that the Tribe ever regained any property interest in the lands opened in 1897. Cf. 25 U.S.C. 463. The upshot is that a ruling endorsing the Tribe's claim that the Uncompahgre Reservation has not been disestablished will not, we believe, have any effect on Utah's selections.

4. The Tribe also asserts that, whether or not the Uncompahgre Reservation has been disestablished, the "opening-up" legislation reserving certain mineral lands from location and entry erects an independent bar to the State's selections, at least insofar as they involve tracts containing oil shale. Again, we disagree.

As the Tribe's brief notes, the 1897 statute that generally opened for location and entry the unallotted lands of the Uncompahgre Reservation excepted "all lands containing gilsonite, asphalt, elaterite, or other like substances," expressly providing that "the title to all of the said lands \* \* \* is reserved to the United States" (Tribe's Motion D-1). If this withdrawal remained effective, the question would be whether oil shale is a "like substance." The affirmative answer suggested by the Tribe is doubtful.\* But in any event, subsequent events moot this issue.

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\* The materials cited at page 11 of the Tribe's Motion—contrary to what is there suggested—indicate that oil shale

The Tribe fails to mention the Act of March 3, 1903, ch. 994, 32 Stat. 982, 998, the relevant portion of which we reproduce in an Appendix, *infra*. That statute directed the President to sell the even-numbered sections containing the specified minerals and previously reserved from location and entry "within the former Uncompahgre Indian Reservation," and, three years later, he duly issued a proclamation offering these lands for sale. Proclamation of June 6, 1906, 34 Stat. 3214 (App., *infra*, 2a-7a). While it does not appear that any sales were actually consummated, the 1903 Act may have had the effect of releasing for state selection even-numbered mineral sections.

It is true, however, that the odd-numbered sections containing the listed minerals remained "locked up." As to them, the Act of 1903 provided that they were "specifically reserved for future action of Congress." And so, the question is whether Congress subsequently released these lands—assuming, *arguendo*, that oil shale lands were included in the initial reservation. As the Tribe recognizes (Motion 12), this may have happened in 1958 when Congress amended the school indemnity selection statutes to permit selection of

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lands were *not* excepted from entry or location in the 1897 Act. Indeed, the Interior Department Report partially quoted in the Motion treats "bituminous shale" *separately* from "gilsonite," and in the same category as "sandstone and limestone," which plainly are not reserved by the 1897 statute. Similarly, the 1958 amendment to the selection statutes, 43 U.S.C. 852(d) (1), discussed *infra*, lists "asphaltic minerals" and "oil shale" *separately*.

mineral lands. In our view, that is indeed what occurred.

Subsection (d)(1) of Section 2276 of the Revised Statutes, added in 1958 (43 U.S.C. 852(d)(1), Pet. Br. 7a), as we read it, is designed to remove any obstacle to state school indemnity selection that results from a withdrawal of lands because they contain coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, or sulphur. Thus, the reservation of certain mineral lands accomplished by the Acts of 1897 and 1903 is cancelled. To be sure, as we argue in our principal brief, this does not immediately make these lands available for state selection because they remain subject to the general 1934 withdrawal order and are, in any event, included in a grazing district. But, henceforth, they are *potentially* available if and when so classified pursuant to the Taylor Grazing Act. The 1958 amendment would accomplish nothing if it were read to leave undisturbed withdrawals premised on the mineral character of the lands. Accordingly, we must reject the Tribe's cramped reading of that provision (Tribe's Motion 12-13).

5. In conclusion, we stress that we have discussed the Tribe's contentions for the limited purpose of indicating that they are unlikely to moot the issues before this Court. The Court need not address, much less resolve, the tribal claims here. In our submission, the Court should deny the Tribe's motion to intervene and reject the plea to remand the case. The questions agitated in that motion, we suggest,

need only be noticed by a statement in this Court's opinion expressly disclaiming any intent to prejudice their decision in the separate litigation now pending before the district court.

Respectfully submitted.

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*Attorney*

SEPTEMBER 1979



## APPENDIX

1. Act of March 3, 1903, ch. 994, 32 Stat. 982, 998:

CHAP. 994.—An Act Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, \* \* \**

\* \* \* \* \*

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in

the office of the County recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the County recorder of Uintah County, Utah, within ninety days after the passage of this Act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this Act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

2. Proclamation of the President of June 6, 1906, 34 Stat. 3214:

Whereas, by the act of Congress approved June 7, 1897 (30 Stats., 87) it was provided:

The Secretary is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indians Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservations or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances, is reserved to the United States.

And whereas, it is provided by the act of Congress approved March 3, 1903 (32 Stats., 998), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department," etc., as follows:

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the Act of Congress entitled 'An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations

with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the County recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such location shall relocate their respective claims and record the same in the office of the County recorder of Uintah County, Utah, within ninety days after the passage of this Act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms

and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this Act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

Now, therefore, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that the even-numbered sections of surveyed lands in said former Uncompahgre Indian Reservation in Utah, heretofore reserved by said Act of June 7, 1897, to the United States as containing deposits of gilsonite, asphaltum, elaterite or other like substances, saving and excepting such of said even numbered sections as may be appropriated and claimed under discoveries and locations made and recorded prior to January first, eighteen hundred and ninety-one, and relocated and re-recorded as specified by said Act of March third, nineteen hundred and three (32 Stat., 998) and saving and excepting lands allotted to Indians, and all other lands legally reserved or appropriated, shall be offered for sale upon sealed bids at the Vernal, Utah, land office in tracts not exceeding forty acres in the aggregate, or the smallest legal subdivision approximating that area; and that the even numbered sections of said lands, now unsurveyed, after the date on which the township plat of survey thereof is officially filed in the



local land office in the usual manner, as well as any of the lands offered at this sale remaining unsold may be advertised and sealed bids invited therefor upon the same terms at the same place and at such time as may be specified in a public notice duly given by direction of the Secretary of the Interior. Inasmuch as the government is unable to determine definitely those tracts in the surveyed even numbered sections principally valuable for deposits of gilsonite, asphaltum, elaterite or other like substances bids may be offered for any forty-acre tract or lot approximating that area subject to the regulations as to proof of character of the land, to be hereafter issued.

The bids for the lands offered will be opened at the Vernal, Utah, land office on Saturday, September 15, 1906, commencing at one o'clock P.M., mountain standard time, and will continue from day to day until all bids have been examined.

All bids to receive consideration must be filed in the district land office at Vernal, Utah, before 4:30 o'clock P.M. of the day preceding that set for the opening of the bids.

The right is reserved to reject any and all bids.

As an individual, or as a member of an association, the purchaser must be twenty-one years of age and a citizen of the United States or have declared his intention to become such citizen.

Bids for said lands shall be in accordance with such form, and at such minimum price as shall be prescribed by the Secretary of the Interior who shall also prescribe all additional rules and regulations necessary to carry into full effect the sale herein provided for.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this  
6th day of June in the year of our  
Lord one thousand nine hundred and  
six, and of the Independence of the  
United States the one hundred and  
thirtieth.

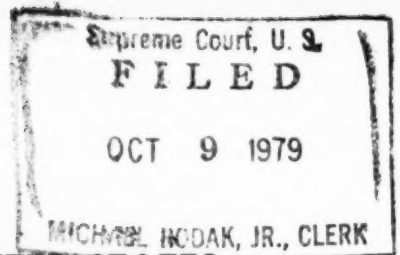
[SEAL]

THEODORE ROOSEVELT

By the President:

ELIHU ROOT

*Secretary of State.*



IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE  
INTERIOR,

*Plaintiff,*

v.

STATE OF UTAH,

*Defendant.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR AMICUS CURIAE

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Commission and its Attorney General), Arizona, Colorado,  
Montana, Nevada, New Mexico, Oregon and Washington

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## IN THE SUPREME COURT OF THE UNITED STATES

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*Plaintiff,*

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STATE OF UTAH,

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

### BRIEF FOR AMICUS CURIAE

State of California (by and through its State Lands  
Commission and its Attorney General)

### OPINIONS BELOW

The opinion of the court of appeals (Pet. Appen. 10a-53a) is reported at 586 F.2d 756. The opinion of the district court (Pet. Appen. 54a-79a) is not reported.

### JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C section 1254(1), this Honorable Court has granted the petition of Cecil T. Andrus, Secretary of the Interior, for a writ of certiorari to review a decision of the United States Court of Appeals for the 10th Circuit.

The State of California, by and through its State Lands Commission and its Attorney General, George Deukmejian, and the other states joining with it respectfully submit this brief as amicus curiae under authority of rule 42(4), United States Supreme Court Rules.

#### INTEREST OF AMICUS CURIAE

California, like most of the other western states, was granted the sixteenth and thirty-sixth section in every township to be held and administered in trust for the perpetual benefit of the public schools. (Act of March 3, 1853, 10 Stat. 244.) The trust nature of the school lands grant is, as the court below indicated, unique, resembling in some degree the public trust in which the states hold their sovereign land. (*Alabama v. Schmidt* (1914) 232 U.S. 168.) In the event any of the lands within this specific "in place" grant are not available by reason of preexisting rights of others, the states have historically had the right to select other land in lieu of such preempted acreages. (*McCreery v. Haskell* (1886) 119 U.S. 327.) The State of California has, as petitioners point out, outstanding rights to select approximately 180,000 acres of such school-indemnity lands. Other western states have corresponding interest. (Pet. for Cert., p. 12, fn. 9.)

Should this Court reverse the decision of the 10th Circuit Court of Appeals, it would have far reaching impacts not only on Utah but also on California and all of the western states. It has been over 100 years since

California received its school land grant. The other western states joining in this brief have grants of similarly long duration. Throughout this period, California has made indemnity selections on the basis of equal acreage without considering values of parcels used as base lands (those not received in place for which the state is entitled to indemnity) or the values of those parcels selected—equal acreage has always been the rule.

Throughout this period there have been changes in the public domain by virtue of both federal reservations for national parks, national forests, power sites, etc., and also both mineral and nonmineral private entries. These reservations and entries have taken many of the most valuable lands in the public domain out of the selection process.

After 100 years of equal acreage selections the Secretary now wants to impose a new rule in the selection process, the so-called "equal value" rule. Even this is a misnomer, however, for equal value implies some sort of reciprocity. The rule proposed by the Secretary does not prevent the states from giving up base lands more valuable than those selected, but it does prevent the states from selecting those lands whose value exceeds the value of the lands the state is giving up. Additionally, the states can only select from those lands left over after federal reservations and private entries. What the Secretary is in essence trying to do is change the rules of the game after seven innings have already been played.

Furthermore, it is only by violating a compact or contract made between the United States and the states



that the Secretary can impose such a rule. As the court of appeals stated:

"The Secretary argues, it seems, that the affected 'Land Grant' states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the 'school lands' granted—or those selected 'in lieu'—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in *State of Wyoming v. United States, supra*." (586 F.2d 756, 772, (1978).)

California and the other western states have waited patiently for over 100 years to receive their school lands. Should this Court reverse the decision of the 10th Circuit Court of Appeals and uphold the Secretary's contentions it may be another 100 years before these grants can be satisfied. Therefore, California and the other states joining in this brief respectfully request this Court consider the arguments contained herein and affirm the decisions of the district court and the Court of Appeals for the 10th Circuit.

#### QUESTIONS PRESENTED

1. Do the provisions of the Taylor Grazing Act confer discretion on the Secretary of the Interior to impose conditions on indemnity land selections made by states in addition to those set forth in sections 851 and 852, 43 United States Code?

2. Does the authority to classify lands set forth in section 7 of the Taylor Grazing Act (43 U.S.C., § 315(f)) give the Secretary the power, uncontrolled by any statutory standards to compare the value of lost base lands with the value of indemnity selections made by a state pursuant to its congressional grant and decline to approve state selections if he determines their values to be disparate?

#### SUPPLEMENTARY STATEMENT OF THE CASE

The factual background of this case is not in dispute. Pursuant to and in accordance with the requirements of sections 851 and 852 of title 43, United States Code (§§ 2275 and 2276 of the rev. stats.), the State of Utah between September 1965 and November 1971, selected 194 parcels of public lands as indemnity for losses to its school land grant occasioned by federal preemption or private entry prior to survey. All the selected lands were located within the exterior boundaries of a grazing district. Little or no action was taken by the Interior Department. Nearly nine years after the first selection was filed, none of the selections had been either approved or disapproved.

Early in 1974, however, things began to happen. First, the Secretary announced that he intended to offer some of the tracts selected by Utah for leasing for oil shale development. After some dispute between Utah and the Secretary, the parties entered into an agreement whereby Utah would succeed to the interest of the United States under the leases if it successfully obtained the selected lands.



Second, and more important, in February 1974, the Secretary, in a letter to Governor Rampton of Utah announced that seven years earlier, in 1967, under the discretionary powers granted him by section 7 of the Taylor Grazing Act, the Secretary had adopted an "equal value" policy in school indemnity selections and that while the department was still not prepared to adjudicate Utah's selections, the equal value policy would be applied to the selections made by Utah. On March 4, 1974, Utah filed suit.

Both parties stipulated there were no contested issues of fact and both moved for summary judgment.

The district court granted Utah's motion. It held that the Taylor Grazing Act did not confer on the Secretary any discretion with respect to school indemnity selections and even if it did, any discretion the Secretary had was limited to determining whether the selections were in compliance with the provisions of sections 852 of title 43 of the United States Code.

The Secretary appealed and the United States Court of Appeals for the 10th Circuit affirmed. The court of appeals held that the criteria governing the discretion of the Secretary in approving school indemnity selections were set forth in the case of *Wyoming v. United States* (1921) 255 U.S. 489 and *Payne v. New Mexico* (1921) 255 U.S. 367; that section 7 of the Taylor Grazing Act could not be construed to grant any discretion to the Secretary with respect to school indemnity selections; and as long as Utah had complied with criteria and requirements

contained in sections 851 and 852 of title 43 of the United States Code, it was entitled to have the selected lands listed to it.

The Secretary then petitioned this Court for hearing. Certiorari was granted on June 11, 1979.

### SUMMARY OF ARGUMENT

The grants of the newly admitted states of lands for the support of common schools date back to 1802. These grants are unique. They are not founded on the beneficence of Congress but upon a solemn bilateral agreement or compact between the United States and each new "public land" state as it entered the Union. The terms of this compact were that the United States would grant to each state a specified number of sections of land in each township within the state and in return the states promised not to tax federal lands within the state and to hold the lands in trust for the purposes upon which they were granted. The purpose of these grants was to promote a degree of equality between the newly admitted states and the older states. Therefore, these grants may be considered to be part and parcel of the constitutionally mandated "equal footing doctrine."

In 1802, with the first school land grant, Congress recognized that there would be situations where the specifically numbered section would not be available to the state because of prior settlement or sale or federal reservation, therefore Congress as an integral part of the school land grant, appropriated and granted additional lands as indemnity for those lost. In 1826, Congress

enacted a general indemnity statute establishing the requirements for all states. This statute has been amended from time to time and presently the prerequisites for such selections are contained in sections 851 and 852 of title 43 of the United States Code. Throughout the entire history of the indemnity selection process the essential feature of the statutes has remained exactly the same as it was in 1802—indemnity selections are to be made on an equal acreage basis.

Prior to 1967, the Secretary of the Interior did not believe himself authorized to consider disparity of values between base lands (i.e., lands unavailable because of pre-existing rights or federal reservation) and lands selected. (E.g., memorandum of September 14, 1962, Associate Solicitor, Div. of Pub. Lands, to Director, Bur. of Land Management, Utah's Appendix B; Memorandum of February 11, 1943, Comr. of the Gen. Land Off. to the Sect. both cited in *Utah v. Kleppe* (1978) 586 F.2d 756, 762-763.) In 1967, the Secretary reversed himself, and adopted the policy that, relying on his discretion, he would refuse to approve indemnity applications that involve "grossly disparate values." With this one stroke of policy the Secretary reversed the 165-year-old statutory rule that indemnity selections are predicated on equal value. Furthermore, the Secretary took this action in spite of the fact that only a year earlier Congress had emphatically rejected the Secretary's attempt to get sections 851 and 852 amended to institute an equal value rather than equal acreage. Thus it appears that the Secretary took it upon himself to accomplish administra-

tively what Congress declined to do legislatively.

The Secretary took this action claiming it was within his "discretion." But this Court emphatically established in the cases of *Payne v. New Mexico*, *supra*, 255 U.S. 367 and *Wyoming v. United States*, *supra*, 255 U.S. 489 that the Secretary's duties with respect to school indemnity selections are not discretionary in nature but are merely ministerial. Unless these cases have been overruled they are clearly controlling and the Secretary has no discretion whatsoever with respect to school indemnity selections.

The Secretary contends that in enacting the Taylor Grazing Act, Congress legislatively overruled and gave the Secretary broad and virtually unlimited discretion in approving state indemnity selections.

The Taylor Grazing Act has no applicability to state indemnity selections for a simple reason—in section 1 of the act, Congress exempted school indemnity selections along with all other grants to the states from the purview of the act.

Section 1 of the act states:

"Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, not to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State." (43 U.S.C. §315.)



The clear and unequivocal language used in the section exempts *any* lands which would be a part of *any* grant to *any* state. Nothing could be clearer. Indeed, it appears that this language was specifically added by Congress in response to concerns by the state that the indemnity selection rights would be affected by the act. Such a construction is entirely consistent with the avowed purpose of the act to stop the destruction of the public rangelands through homesteading.

Additionally, the Secretary's major premise is faulty. He asserts that the 1934 act effectively terminated all school indemnity selection rights but in the 1936 amendment to section 7 of the act restored those rights but made them subject to secretarial discretion.

In the above-quoted language of section 1, Congress again in clear and unequivocal language added an additional safeguard for the states. Unless the act *expressly* provides otherwise, the states' rights to "initiate" school indemnity selections remain as before. The 1934 act made no mention at all of indemnity selection rights, therefore, they were not diminished, restricted or impaired by the provisions of the Taylor Grazing Act.

Furthermore, the 1936 amendment to section 7 is ambiguous. While it speaks generally of the selection of lieu lands, the primary thrust is to uses and school indemnity selections are not uses. The Senate report stated the amendment was designed to restore *private* lieu selection rights. This is the only reasonable construction which can be given to the statute. To construe section 7 to apply to school indemnity selections would violate

several precepts of statutory construction; that the specific requirements of sections 851 and 852 of title 43 of the United States Code must control over the general language of section 7 and the school land grants are to be liberally construed in favor of the states.

Another reason the Secretary's contention that this Court's decisions in *Payne v. New Mexico* and *Wyoming v. United States* have been legislatively overruled must fail is that recent judicial decisions have affirmed that these cases are still good law even after enactment of the Taylor Grazing Act.

Finally, even assuming that the Secretary does have discretion, this discretion does not and cannot give him the power to impose an equal value rule. The case of *Bronken v. Morton* (9th Cir. 1973) 473 F.2d 790, holds that even where the Secretary has discretion to classify lands under section 7 of the Taylor Grazing Act he cannot impose an equal value rule. Even if this case does not collaterally estop the Secretary from claiming authority to impose an equal value rule, it is a clear holding that the Secretary cannot impose such a rule even where he has discretion.

The district court and the court of appeals carefully considered and rejected the Secretary's arguments. We respectfully request this Court do the same.



## ARGUMENT

- I. School Land Grants are to be Liberally Construed Because they are Unique—They are Part of a Bilateral Compact Between the States and the United States and are Held in Trust by the States

Proper understanding of the issues involved in this case requires consideration of the nature and purpose of the grant of school lands to the states with the concomitant and integral right of the states to select indemnity or lieu lands for those lost through no fault of the states.

- A. The Purpose of the School Land Grant Was to Give Revenue to the Public Land States for the Support of Schools in Lieu of Taxation of Federal Lands

Following the Revolutionary War, the thirteen colonies became in essence thirteen sovereign and independent nations and, as such, had complete control of the lands within their borders. When they adopted and ratified the Constitution, thereby becoming the original thirteen states, there were no "federal" lands within their borders. All of the land was either owned by the states or by private parties and, therefore, all the land within a particular state was subject to taxation by the states. Taxes on these lands could be used for a variety of essential governmental services including the establishment and maintenance of a system of public schools. Later on, however, in new states seeking admission to the Union, the United States claimed federal ownership of these territories by virtue of treaties, state cessions or purchase. It was common for the federal government to

condition admission upon recognition of such federal ownership within the state, and to extract a promise from the newly admitted state not to tax such lands. (E.g., Act for the Admission of California Into the Union, 9 Stat. 452; but see *Coyle v. Oklahoma* (1911) 221 U.S. 559; *Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 212, 221.) Such federal ownership—whether validly extracted or not, created a practical problem with respect to generation of sufficient tax revenue for providing essential government services such as the establishment and maintenance of a public school system. One obvious solution would have been to give the states all the public lands withheld by the government.<sup>1</sup> But this solution had some definite drawbacks.<sup>2</sup> So Congress decided to enter into a compact with each newly admitted state whereby the states would pledge not to tax federal lands and in return Congress would grant each state a certain amount of the public lands within its borders. These so-called school lands could then be sold or leased by the state to generate revenues for the establishment and maintenance of a public school system. By this method a certain degree of equality between the older states and those newly admitted was achieved.

Beginning with Ohio in 1802, as the first true "public land" state, Congress carried this plan into effect. Ohio pledged not to tax public domain lands located within the state and in return Congress granted it section 16

<sup>1</sup> For history of the school land grants see Gates, "History of Public Land Law Development," Public Land Law Review Commission, ch. XII (1968).

<sup>2</sup> It appears that Congress was concerned it would not have been able to reduce the national debt without the revenues generated from the sales of public lands. (See Gates, *id.*, p. 288.)

within each township. Ohio's Enabling Act (2 Stat. 175) provides in part:

*"And be it further enacted,* That the following propositions . . . are hereby offered . . . for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.

*" . . . That the section, number sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.*

*" . . . Provided always,* that the three foregoing proposition(s) herein offered, are [is] on the condition(s) that the convention of the said state shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the state, whether for state, county, township or any other purpose whatever, for the term of five years from and after the date of sale. (*Id.*)

Although Congress later increased the number of sections granted to the new states entering the Union (for example, California received two sections in 1853 (10 Stat. 244) and Utah four sections in 1894 (28 Stat. 107)), the essence of the school land grant remained the same—the states were required to adopt an irrevocable ordinance promising not to tax federal property and the Congress granted them lands for schools. For example,

California's grant is similar to that of Ohio and of Utah. (The text of Utah's grant is contained in brief for petn., Appen., p. la.) Section 6 of the act (10 Stat. 244) granted to California sections 16 and 36 for the purpose of public schools and section 7 of the same act granted land as indemnity for losses. Section 7 provides in part:

*" . . . That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,'<sup>3</sup> and which shall be subject to approval by the Secretary of the Interior." (*Id.*)*

**B. Acceptance by the State of a School Lands Grant Imposes a Further Obligation on the States—They are Required to Hold the Lands in Trust for the Support of the State's Public School System**

In addition to the promise of the states not to tax federal lands, the acceptance of school lands by the state also entails an additional promise by the states that they

<sup>3</sup> The act of May 20, 1826, granted indemnity for fractional townships and established a formula whereby the amount of land which could be selected depended on the size of the fractional township. This same formula is currently contained in 43 U.S.C., § 852(b).



will hold those lands in trust for the support of the public school system. The nature of this trust was recently reaffirmed by this Court in the case of *Lassen v. Arizona* (1967) 385 U.S. 458. In that case, the Land Commissioner of Arizona attempted to grant, without compensation, material sites and rights of way over certain school lands to the Arizona highway department, citing both the public purpose served by the highway and the potential increase in value of the remaining portions of the school lands. This Court rejected these contentions and held that the lands granted to Arizona were impressed with a trust for the benefit of the public school system and, therefore, the state could only use the land and materials upon the payment of the full, fair market value of the materials and rights-of-way taken. (385 U.S. at p. 469.)

C. The School Land Grants are part of the Bilateral Compact Between the States and the Federal Government

It appears, therefore, that the grants to the state of school lands are a part of a bilateral compact between the states and the federal government whereby the states received grants from the federal government and in return pledged not to tax federal lands and also pledged to hold these lands in trust for the purposes for which they were granted. The Ohio statute expressly recognized this compact when it stated that if accepted by the state, the school grant "shall be obligatory on the United States." The bilateral nature of this compact has also been recognized in judicial decisions. In *State of Nebraska v. Platte Valley Public Power & Irrigation Dis-*

*trict* (Neb. 1946) 23 N.W.2d 300, the court expressly recognized that the grant of school lands and its acceptance by the state constitutes a solemn compact between the United States and the state and in *Cooper v. Roberts* (1855) (18 How. 173), this Court described the school land grant to Michigan as a "compact" between Michigan and the United States.

D. The School Land Grant May be Part of the Equal Footing Doctrine

Under the equal footing doctrine, newly admitted states must be accorded essentially the same rights as the original states. This is not a mere matter of congressional policy but is required by the Constitution itself. (See, e.g., *Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363; *Pollard's Lessee v. Hagan*, *supra*, 44 U.S. (3 How.) 212; *Shively v. Bowlby* (1894) 152 U.S. 1.) Whether retention by the United States of lands amounting in many states to well over half of their total areas complies with this constitutional mandate is questionable. Assuming, however, that the United States could retain grossly disparate holdings, it appears that the school land grants were an effort to comply with the equal footing doctrine for the purpose of giving the newly admitted states a measure of equality with the original states whose lands were all subject to state taxation. In addition, the "equal footing" nature of these grants, was at least impliedly recognized by this Court in *United States v. Morrison* (1916) 240 U.S. 192, 205 and in *Heydenfelt v. Daney Gold and Silver Mining*



*Co.* (1876) 93 U.S. 634, 638, where this Court interpreted the school land grant of one state with reference to that of another state.

**E. The Statutes Governing School Indemnity Selections Have Always Specified an Equal Acreage Exchange**

With the very first school land grant to Ohio in 1802, Congress recognized that there would be instances where the specific section or sections of land granted to the states would be unavailable for a variety of reasons. As an integral part of the school land grant to Ohio, therefore, Congress also provided that where the specifically numbered section of land within a particular township was unavailable, other lands of equal acreage were granted. (*Supra*, at p. 23.)

In 1826, Congress enacted the first general school indemnity statute. It has been amended from time to time (for example in 1958, Congress allowed the states to select mineral lands provided certain conditions were met) and it was the forerunner of what are now sections 851 and 852 of title 43 of the United States Code. In spite of these amendments, the essential principle of the statute has been the same through the years—the selection process is to be done on an *equal acreage basis*.

As the statutes presently read, section 851 appropriates and grants to the states lands of “equal acreage” where losses to school land sections in place occur for a variety of reasons and provides that the states may select such lands in accordance with the provisions of section 852.

Section 852 sets forth the standards for state selection of other lands in lieu of those granted sections in place. Insofar as is relevant here, that statute permits the selection of such lands from any unappropriated surveyed or unsurveyed public lands within the state where such losses or deficiencies occur subject to the following restrictions:

“(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

“(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State . . . .” (43 U.S.C. § 852.)

The Secretary has, in the past, asked Congress to amend section 852 to change the 150-year-old equal acreage rule. In 1966, sections 2275 and 2276 of the Revised Statutes (43 U.S.C., §§ 851–852) were amended to liberalize the indemnity selection program. (P.L. 89-470; 80 Stat. 220.) In its report on this legislation, the Department of the Interior stated:

“The bill does not deal with the equal value concept with respect to lands valuable for leaseable minerals involved in State selections. We have previously recommended language designed to resolve this problem. Our primary purpose was to inform the Congress of the facts, and to give the Congress an opportunity to legislate on the subject if it wishes to

do so. In the House of Representatives, H.R. 16 embodies the equal value concept. The House committee tabled that bill after hearings, and reported H.R. 5984 without the equal value concept. The problem was called to your attention in our report on S 1883. We believe the subject merits consideration by your committee. In our prior reports we stated a preference for legislation which included this concept, but indicated no objection to the enactment of a bill without it." (Sen. Rep. No. 1213, 2 U.S. Code & Adm. News, 89th Cong., 2d Sess. (1966) at p. 2326.)

Congress rejected the Secretary's amendment and elected to retain the equal acreage criteria.

II. The Secretary's Duties With Respect to School Indemnity Selections were Set forth by This Court in *Payne v. New Mexico* and *Wyoming v. United States*—These duties are strictly Ministerial in Nature

The question of whether the Secretary has discretion in approving school land selections was settled long ago by this Court in the cases of *Payne v. New Mexico*, *supra*, 255 U.S. 367 and *Wyoming v. United States*, *supra*, 255 U.S. 489.

In *Payne v. New Mexico*, the State of New Mexico had lost a school land section in place by reason of its inclusion in a federal reservation. New Mexico then applied for indemnity, and the selection was regular upon its face, as is the case here. Prior to final issuance of the clear list, however, the boundaries of the reservation were changed to delete the school land section in place (the base land on which New Mexico indemnity selection had been made). This Court held that New Mex-

ico's selection was not to be defeated by such subsequent events, since its validity was to be governed by the conditions existing at the time of the selection. As this Court said:

"The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard." (*Id.* at p. 370.)

The Secretary also asserted that because New Mexico's enabling act provided that indemnity selections were to be subject to "the approval of the Secretary of the Interior," he had discretion to approve or deny the selection. This Court disposed of this contention in short order. It said:

"But it is said that as the selection is 'subject to the approval of the Secretary of the Interior' no right can become vested, nor equitable title be acquired, thereunder unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.



The power conferred is 'judicial in nature' and not only involves the authority but implies the duty 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' " (*Id.* at p. 371; citation omitted.)

Three weeks later this Court decided *Wyoming v. United States*, *supra*, 255 U.S. 489. In that case, Wyoming had lost a school land section by virtue of its inclusion in a national forest. Wyoming duly filed its indemnity selection. However, in the intervening years since the list was filed, the selected lands were found to be valuable because of oil deposits. Seeking to retain the lands in federal ownership because of the subsequent discovery of oil, the Secretary rejected the selection. As in the *Payne* case, this Court again affirmed that the validity of the selection depended on conditions at the time the selection was made and held that the Secretary's duties with respect to school indemnity selections were ministerial in nature. This Court said:

"The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the State and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the State which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting

or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912." (255 U.S. 489, p. 496.)

The *Payne* and *Wyoming* cases are directly in point and dispositive of the issues involved in the current dispute. The state's right to select indemnity lands is to be exercised at the discretion of the states—not the Secretary of the Interior. If the selection lists are filed in accordance with the provisions of 43 U.S.C. section 852, as determined by the Secretary in his *ministerial* adjudication, he is required to approve them. He has no discretion to approve or deny them on any basis other than they do not comply with the requirements of section 852.

### III. The Taylor Grazing Act did not Confer Discretion on the Secretary of Interior to Impose Additional Conditions Upon State School Indemnity Selections

Contrary to the Secretary's contention the Taylor Grazing Act (43 U.S.C., § 315, et seq.)—or more specifically a 1936 amendment to the act—did not overrule this Court's decision in the *Payne* and *Wyoming* cases. For a variety of reasons, the Taylor Grazing Act cannot be construed to give the Secretary any discretion with respect to school indemnity selections.

The Taylor Grazing Act (48 Stat. 1270) was passed by Congress in 1934. Its purpose was to:



" . . . halt the destructive use of the public range-lands and to prevent the continued breakup of natural grazing areas by homesteading, which was taking the land with access to water and leaving useful grasslands without any water. . . ." (*History of the Public Land Law Development*, Public Land Law Rev. Com., ch. XXI, p. 607.)

The Secretary's sole contention in this case is that this act with its avowed purpose of stopping the destruction of the public lands through homesteading, cut off all school indemnity selection rights, and that Congress in 1936 by amending section 7 of the act restored those rights but made them subject to the Secretary's discretion. These contentions are not supported by the language of the statute in question. In the Taylor Grazing Act, Congress expressly and in clear and unequivocal language exempted school indemnity selections; the Secretary's underlying premise that the act completely cut off all school indemnity selections is erroneous; the 1936 amendment to the Taylor Grazing Act cannot be construed to apply to school indemnity selections; and recent judicial decisions have affirmed that the holdings in *Payne v. New Mexico* and *Wyoming v. United States* are still valid law in spite of the enactment of the Taylor Grazing Act.

A. Section 1 of the Taylor Grazing Act in Clear and Unequivocal Language Expressly Exempts School Indemnity Selections

The primary reason the Taylor Grazing Act does not confer discretion on the Secretary to approve or deny school indemnity selections is simple. In 1934, when

Congress passed the Taylor Grazing Act, it expressly exempted school indemnity selections from the operation of the act. This language is found in section 1 of the act.

Section 1 of the Taylor Grazing Act (43 U.S.C., § 315) provides that "nothing in this chapter shall be construed to . . . affect *any* land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of *any* grant to *any* state." (Emphasis added.)

The language of section 1 is clear and unequivocal. It applies to any lands which would be a part of any grant to any state. As had been shown, school indemnity selections were granted to the states by Congress at the same time and in the same statutes by which Congress granted school lands to the states. They are an integral and essential part of the school land grant to the states. They are part and parcel of the sacred and bilateral compact between the United States and the states. School indemnity lands are lands which are part of the congressional grant of school lands to the states.

But the Secretary contends this language should be limited to school lands in place. In suggesting that this language should be read to apply only to school land sections in place, the Secretary is, in essence, asserting that the language of section 1 should be read as "any land which would have been part of any grant to any state *except for school indemnity selections*." Such a reading would conflict with the plain, clear, and unequivocal language Congress used. Presumably if Congress had intended to limit the exemption in section 1

to only school lands in place it could have done so by using much more restrictive language. Instead, Congress opted for the much broader language of *any* lands, *any* grant, and *any* state.

Furthermore, while there is no direct testimony or statement in the legislative history of the Taylor Grazing Act showing why this language was included in the act, there is some indication that this language was expressly included in the Taylor Grazing Act to expressly deal with the school indemnity selection process. When HR 2835, a predecessor bill to HR 6462 which became the Taylor Grazing Act, was being reviewed before the House Committee on the Public Lands, a letter from the General Land Office Commissioner, Mr. Johnson, was read into the record. This letter stated in part that:

"A number of the States have objected upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections." (To Provide for the Orderly Use Improvement, and Development of the Public Range, Hearings before the Committee on the Public Lands House of Representatives, 73rd Cong., 1st Sess. on H.R. 2835 and 73rd Cong. 2nd Sess. on H.R. 6462.)

This report was considered as part of the record in the House hearings on HR 6462 which later became the Taylor Grazing Act. (*Id.* at p. 66.) Prior to passing HR 6462 out of committee, it was amended to add the language exempt from the operation of the act any lands which would be part of any grant to any state. Therefore, while there is no direct testimony to the effect that the purpose of this amendment was to specifically ex-

empt school indemnity selections, we do know that the states' concern that the Taylor Act would somehow restrict their school indemnity rights was part of the record in considering HR 6462 and that Congress added extremely broad language exempting any grant to any state from the operation of the act. Given the broad, clear and unequivocal language Congress used it seems almost certain that HR 6462 was amended to meet the state concerns expressed in Commissioner Johnson's letter.<sup>4</sup>

1. Testimony of Additional Witnesses Well Versed in the Law, Shows that Following the Amendment of HR 6462, the Committee's Deliberations Were not Concerned with Indemnity Selections But Instead Focused on the Exchange Provisions of Section 8

The Secretary has cited the testimony of several witnesses (among them the Governor of Wyoming) before the Senate Committee in support of his contention that the broad language in section 1 should be construed to only apply to school land grants in place. (Pet. Brief, p. 38.) This testimony was given after section 1 of HR 6462 had been amended to add the language exempting from the provisions of Taylor Grazing Act any lands which would be a part of any grant to any state and no such

<sup>4</sup> The Secretary seeks to draw the opposite inference from these facts. (Pet. brief, p. 38, fn. 17.) What the Secretary fails to point out is that this letter was part of the record the House Committee had before it when it considered HR 6462. At the time these concerns were brought before the House Committee, HR 6462 did not contain the broad language exempting any grants to the state, but this language was added prior to passing the bill out of the committee.



inference can be drawn from it. When examined in full, this testimony supports the opposite conclusion. It shows that following the amendment to section 1 of the act the state's concerns were allayed and they then focused in on the exchange provisions of section 8 of the act.

On the final day of hearings, both Governor Miller of Wyoming and Mr. George Fisher, Executive Secretary of the State Land Board of Utah testified. (Governor Miller's testimony is contained in S. Hgs. on HR 6462, *supra*, at pp. 195-209 and Mr. Fisher's testimony at pp. 209-216.) This testimony came after the House of Representatives had already amended HR 6462 to include the broad exception for all state grants. (*Id.*, at p. 1.) As is apparent from a full reading of their testimony, both men were familiar with the bill and with the land grants to the states. Both were also primarily concerned about the effect of the Taylor Grazing Act on school land sections in place to which the state had already received title. The reason for this concern was that the school land sections to which the states had already received title were, to a large extent, isolated tracts surrounded by a sea of federal lands. If these federal lands were then included within a grazing district and a federal grazing lease was issued to a private party, the only way the state could prevent trespass by the federal lessee and obtain any beneficial use of that portion of the school lands within the district would be to fence them—an obviously impossible task. The inclusion of these school lands within a grazing district and the issuance of leases to private parties would substantially decrease the value of

the state school land sections which the state had already received in place and in some cases, render them worthless. Therefore, these witnesses were vitally concerned that the exchange provisions of section 8 be made mandatory and not discretionary.<sup>5</sup>

Given the knowledge of these men it seems apparent that if they had thought the state would lose all school indemnity selection rights by virtue of the 1934 act they would have said so. But they did not. In fact Governor Miller expressly stated that he thought these rights would continue:

"I think there should be some definite protection to the States in this bill in this particular: When the forest reserves were established by law the right was given to the States to exchange school sections within the boundaries of forest reserves for unappropriated public domain outside the reserves. That right remains. We have not in Wyoming exhausted all of that right. That is to say, we still have the right of selection under that law. If these grazing districts are established we will be very, very much restricted in that right to exchange our lands now in the forest reserves for lands outside the reserves, because those lands once established in grazing districts will render it very difficult to make such selections.

"If I may illustrate for the benefit of the committee: We will say that Mr. Brock over here, a cattleman, finds over in Johnson County a tract of 40 or 80

<sup>5</sup> Indeed following passage of the Taylor Grazing Act, the Secretary denied that these provisions in section 8 were mandatory. Congress amended the statute to make clear that they were mandatory and on the strength of a solicitor's opinion the Secretary reluctantly agreed. (See, e.g., 61 I.D. 270.)



or 320 acres of advantageously located public domain that he can use in connection with his general ranching operations. He can apply to the State to have that land selected as State land. The State will then exchange an equal area over in the forest reserve for this area down here, and lease or sell the land to Mr. Brock. If, however, these grazing districts are established then Mr. Brock is going to have control of all that area. He does not need to ask the State for any help in that area, and our sections over in the forest reserve will just stay there for all time." (To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hgs. on H.R. 6462 Before the Sen. Comm. on Public Lands and Surveys, 73d Cong., 2d Sess. pp. 204-205 (1934).)

Obviously, Governor Miller felt that the states' school indemnity selection rights were adequately protected by the express exemption of section 1 of the act.

The only other testimony cited by the Secretary is that of Howard Smith who appeared before the committee representing both the State of Arizona and the Arizona Cattle Growers Association. About the best that can be said for Mr. Smith's testimony is that it is confused. Mr. Smith did say that *private* scrip or lieu selections should be authorized within grazing districts but there is nothing in his testimony which explicitly establishes that he believed the states would not be allowed to initiate school indemnity selections within a grazing district. It is also apparent that Mr. Smith was totally opposed to the Taylor Grazing Act and it is well established that speeches by opponents of legislation are to be accorded little weight in interpreting the act in question. (*Holtz-*

*man v. Schlesinger*, 414 U.S. 1304, 1313, n. 13; also *Woodwork Manufacturers v. NLRB* (1967) 386 U.S. 612, 639-640.)

There is really nothing in the materials cited by the Secretary which would alter the conclusion mandated by the clear and unequivocal language of section 1. The broad provision of this exemption was designed to the exempt state school indemnity selections as well as any other lands which would have been a part of a state grant from the purview of the Taylor Grazing Act.

2. The Language Used in Executive Order 6910 Supports the Conclusion that the Language of Section 1 Must Exclude State School Indemnity Selections from the Provisions of the Taylor Grazing Act

Following the enactment of the Taylor Grazing Act in 1934 the President issued Executive Order 6910. By its terms this order withdrew from "settlement, location, sale or entry" all the public lands in 12 western states. The language of this order is significant because a state school indemnity selection is a "selection." It is not a settlement. It is not a location. It is not a sale. And it is not an entry. Nonetheless, the Secretary contends that a school indemnity selection is an entry. The only place we have ever seen state school indemnity selections termed "entries" is in the Secretary's brief.

That the purview of Executive Order 6910 did not include school indemnity selections also is shown by statements made by a member of the Senate Committee on Public Lands and Surveys and by Assistant Solicitor

Poole of the Department of the Interior.

Following the enactment of the Taylor Grazing Act in 1934 and the issuance of Executive Order 6910; hearings were held on S 2539 to amend the Taylor Grazing Act. In the course of those hearings the subject of Executive Order 6910 came up. This discussion followed:

"Senator CAREY. Do you understand there was any reason, Senator Adams, for an Executive order?

"Senator O'MAHONEY. The Executive order, as I understand it, Senator, was merely to stop homestead entrance and other entries of the ordinary nature on the public domain.

"Senator CAREY. Does not the act itself automatically stop them?

"Senator O'MAHONEY. No; because there was a limitation of the acreage. This act limits the application of the Taylor Grazing Act to 80,000,000 acres of land.

"Now, the Executive order had the effect of withdrawing all of the public domain from homestead entrance and other entries of the ordinary nature. For instance, of settlement and entry, except the minimum." (To Amend the Taylor Grazing Act Hgs. Before the Com. on Pub. Lands and Surveys, U. S. Sen., 74th Cong., 1st Sess. on S 2539 at p. 51 (1935).)

Not only is a school indemnity selection not an entry but it is also not "ordinary." School indemnity selections are not merely rights granted by Congress in its benevolence but are part of a solemn bilateral agreement between the United States and the states. (*Supra*, at p. 25.) School lands are held by the states subject to a solemn trust. (*Supra*, at p. 24.) These lands are not ordinary

in any sense of the word; if anything, they are unique.

Even more explicit is the statement made by Solicitor Poole before the House Committee on the Public Lands in hearings concerning the possible amendment of the Taylor Grazing Act. In his testimony, Solicitor Poole stated:

"Mr. Poole. Yes. There was a general withdrawal order issued by the President last November. By the terms of that order and by virtue of the provisions of the law under which the President issued it, any one who had initiated a homestead entry, either by settlement or by filing an application, is fully protected; and he may proceed and makes proof or is a position to make proof on that particular tract of land.

"After the withdrawal order was made, of course no right could be initiated, because the purpose of the President's proclamation was to eliminate homesteading until a classification was made.

"Mr. Lemke. You protect the person who had made application, but how about the person who has just squatted and put up some buildings but has not had time or who has neglected to put in an application? What would you call initiating?

"Mr. Poole. There are two ways in which a homestead is initiated. One is by physical entry. The other is by filing an application.

"Mrs. Greenway. May I ask a question in that connection? I have quite a few people, especially in the area under reclamation withdrawal near Yuma and elsewhere, who have filed on mining claims and have done assessment work on their claims in this area that has been withdrawn. What is going to happen to them?

"Mr. Poole. They are not affected at all. The with-



drawal order or the passage of the Taylor order did not in any wise affect mining or mining operations or entries. This public land was withdrawn, Mrs. Greenway, *only for the purpose of stopping homestead entries.*" (To Provide For The Orderly Improvement, and Development the Public Range, Hgs. before the Com. on the Pub. Lands, H.R., 74th Cong., 1st Sess. on H.R. 3019, p. 98 (1935) emphasis added.)

This interpretation of the withdrawal order as being restricted to homesteading is entirely consistent with the avowed purpose of the Taylor Grazing Act to stop the destruction of the public range through homesteading.

Furthermore, other Executive Orders seem to have no trouble using the term "selection" when it is appropriate. (E.g., cf. Exec. Order of Nov. 26, 1934, which speaks in terms of entry, selection, claim, withdrawal, or reservation with the language used in Exec. Order 6910 which speaks in terms of entry, location, sale and entry.) The language of Executive Order 6910 must, therefore, be construed to apply only to homestead and homestead entries and such a construction supports the conclusion that the language of section 1 of the Taylor Grazing Act expressly exempts state school indemnity selections from the operation of the act.

### 3. Circular No. 1346 Speaks Only to School Lands in Place. It Makes no Reference to School Indemnity Selections

Finally, the Secretary claims that Circular No. 1346 supports his assertion that the express exemption contained in section 1 must be restrictively construed to

only apply to school lands in place and not include school indemnity selections. This assertion is simply not true. Circular No. 1346 is merely a set of regulations governing gifts of land and state and private exchanges under section 8 of the Taylor Grazing Act. The sole subject this circular addresses with respect to school lands is whether school lands in place pass to the states. The circular provides:

"The words 'Nothing in this Act shall be construed in any way . . . to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State' were obviously intended to preserve school sections, both surveyed and unsurveyed, included within the boundaries of a grazing district established under the provisions of the Taylor Grazing Act, in exactly the same status for the purpose of any grant to any State as the lands would have had had the Taylor Grazing Act not been passed and had the lands not been included in the grazing district." (55 I.D. 589 (1936).)

"It follows, therefore, that neither surveyed nor unsurveyed school sections within the boundaries of a grazing district may for that reason only be offered as a basis for an equal area indemnity selection under the act of February 28, 1891 (26 Stat. 796). It also follows that the inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office.

"Granted school sections owned by a State within or without the boundaries of a grazing district may be assigned by the State as a basis for an equal value



exchange, as provided in section 8 of the Taylor Grazing Act." (55 I.D. 192, 204-205 (1925).)

Similarly, in Circular No. 1398, the conclusion is stated:

"A grazing district is not a reservation within the meaning of the Act of February 28, 1891 (26 Stat. 796), and therefore school sections, surveyed or unsurveyed, within a grazing district, are not for that reason only valid base for indemnity school land selections under said act of 1891. The inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office." (55 I.D. 582, 589 (1936).)

Neither of these circulars make any mention whatsoever of the provisions of section 1 being limited to only school land grants in place and such a construction cannot be applied to these circulars.<sup>6</sup> There is no question that the exemption in section 1 was intended to apply to school lands in place. That was clearly one of the intentions of the exemption contained in section 1 of the act. But this does not mean this was the only intent of that section. To assert that merely because these regulations, which do not even purport to deal with school indemni-

<sup>6</sup> Such a construction seem to be contradicted, at least by implication, in the general explanation of the Taylor Grazing Act (55 I.D. 524) promulgated by the Secretary which seems to interpret section 1 very broadly. This explanation provides:

"*Construction of act.*—Nothing in the act is to be construed to impair any rights initiated under the public land laws, except as required by other provisions of the act. The creation of a grazing district will not defeat the grant, to a State, of lands heretofore or hereafter surveyed."

ty selections, and which confine themselves to exchange under section 8 of the Taylor Grazing Act, show such an exclusivity, obviously ignores the clear language and mandate of the statute.<sup>7</sup> Furthermore, the Secretary never explains how if a grazing district is not a "reservation" within the meaning of section 1 of the Act of February 28, 1891, it is a reservation which will render the land appropriated under section 2 of the very same act.

In conclusion, then none of the materials cited by the Secretary are sufficient to compel a contrary construction of the clear and unambiguous exemption which Congress provided in section 1 of the Taylor Grazing Act. The very breadth of this language which, by its terms, applies to "any lands which would have been part of any grant to any state" mandates the conclusion that school indemnity selections are from the provisions of the Taylor Grazing Act.

#### B. The Taylor Grazing Act as Enacted in 1934 does not Prohibit School Indemnity Selections

Even assuming arguendo that the explicit exemption contained in section 1 of the Taylor Grazing Act does not

<sup>7</sup> The language in section 1 which refers to lands heretofore or hereafter surveyed also cannot be construed as restricting the operation of the broad exemption for state grants in section 1 solely to school land grants in place. At the time the Taylor Grazing Act was enacted, the states were only entitled to select lands as indemnity for losses to the school land grant which had been surveyed. It is only recently that states have been allowed to select unsurveyed lands. (See Pub. Law 89-470 (1966).) Therefore, the limitation as to lands heretofore or hereafter surveyed applied with equal force to indemnity selections because unsurveyed sections could not be selected.

apply to school indemnity selections, the Secretary's argument still falls far short of the mark. His argument is centered around a single basic premise. That premise is that the 1934 enactment of the Taylor Grazing Act cut off all state indemnity selection rights. The significance of this distinction is that, if the 1934 act cut off all selection rights then the Secretary must show that the 1936 amendment to section 7 restored these rights which were already subject to the Taylor Grazing Act. On the other hand, if the 1934 act did not cut off all selection rights, the Secretary must prove that the 1936 amendment to section 7 was designed to expressly bring those previously exempted school indemnity selections within the purview of the Taylor Grazing Act. This he certainly cannot do.

In addition to the broad exemption provided by section 1 of the Taylor Grazing Act, Congress also added additional language to protect the rights of the states to select lands as indemnity for the loss of school land selections in place. This language provides:

"Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter. . . ."  
(43 U.S.C., § 315.)

The import of this language is clear. Unless the act *expressly* provides otherwise the right of the states to initiate school indemnity selections remains as before.

And the 1934 act says absolutely nothing about school indemnity selections.<sup>8</sup>

The Secretary in his brief speculates that this language in section 1 was merely included to protect existing water rights but again the breadth of the language used by Congress betrays him. *Nothing* shall be *construed* in *any* way to diminish, restrict or impair *any* right which has been heretofore or *hereafter* initiated . . . except as otherwise *expressly* provided for in this chapter. It is difficult to conceive how this section could be more broadly or less clearly drafted.

Furthermore, the Secretary's assertion that in spite of this language the 1934 act terminated all school indemnity selections is directly contradicted by the testimony of the then Secretary of the Interior before a congressional committee. This testimony occurred after the enactment of the 1934 act and the promulgation of Executive Order 6910 and was given by the Secretary before the House Committee on the Public Lands. Concerning a possible amendment of the Taylor Grazing Act, Secretary Ickes stated:

"In regard to the matter of land exchanges with

<sup>8</sup> As enacted in 1934, section 7 of the act reads in part:

"That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof . . . ."



the State and others, I wish to assure you that the utmost dispatch will be used in fulfilling the exchange provisions of the law. The land grants which the States have received are an obligation which the Government should and intends to fulfill." (H. hgs. on H.R. 3019, *supra*, at p. 68.)

Solicitor Poole made a similar statement at a conference on proposed amendments to the Taylor Grazing Law held in Denver, Colorado, on February 13, 1935, and which was also presented to the House Committee. Solicitor Poole, who had testified numerous times on the Taylor Grazing Act and who was one of the prime movers of the bill stated:

"... all I can say is what the Secretary said in his address yesterday, and what we stated to the committees when this bill was pending; and that is that we are going to keep faith with the States in satisfying all grants and indemnity rights. We are going to do that just as speedily as it is possible, and I assure you that there will be enough land, and land of the proper character [sic], to satisfy the States to take care of their unsatisfied grants." (*Id.*, at p. 156.)

These statements are entirely consistent with the fact that at no time in any of the testimony before either House of Congress on any of the bills regarding grazing did any member of the Department of the Interior testify that the Taylor Grazing Act would stop all school indemnity selections. Given this absence of testimony and given the statements of both the Secretary of the Interior and Solicitor Poole, it is difficult to imagine how the Secretary can now assert that the 1934 act can be construed to have entirely cut off all school indemnity

selections especially in light of the clear and unequivocal language which Congress used in section 1 of the Taylor Grazing Act.

C. The 1936 Amendment to Section 7 of the Taylor Grazing Act Cannot be Construed as Bringing School Indemnity Selections Within the Ambit of the Act

In 1936, Congress amended the Taylor Grazing Act to increase the acreage which could be included within grazing districts from 80,000,000 acres to 143,000,000. At the same time Congress amended section 7 of the act to read in pertinent part:

"The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lieu [sic], exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . ." (43 U.S.C., § 315(f).)



It is this amendment which the Secretary claims gives him discretion to classify lands as part of the school indemnity selection process. For a variety of reasons this amendment cannot be construed to give the Secretary any discretion in school indemnity selections.

1. The Only Rational Construction of the 1936 Amendment to the Taylor Grazing Act is That it is Limited to Private Lieu Selections

The Senate report regarding the 1936 amendment to section 7 is very explicit. It states:

"It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available *for private entry* lands which are more valuable for other purposes than grazing." (Sen. Rept. No. 2371, 74th Cong., 2d Sess., June 15, 1936, at p. 2, emphasis added.)

This statement of the 1936 amendment is directed *solely* to private grants and lieu selections is an entirely reasonable construction of the language used in the statute. Throughout the years Congress has given to private parties both land grants and lieu selection rights. (See, e.g., *Hall v. Hickel* (D.C. Nev. 1969) 305 F.Supp. 723, rev. and remanded on other grounds, 473 F.2d 790 (9th Cir. 1973), cert den. 414 U.S. 828 (1973), involving "Valentine Scrip" lands; 25 U.S.C., § 334 (selection rights of Indians residing off of an Indian Reservation) and 43 U.S.C., § 274 (selection rights to be exercised by veterans).)

A number of these selections or entries require land to be classified as agricultural and opened to homesteading before they can be exercised. (See, e.g., *Bronken v. Morton* (9th Cir. 1973) 473 F.2d 790, 796, 797; *Finch v. U.S.* (10 Cir. 1967) 387 F.2d 13, 16.) Therefore, they fall within the direct purpose of the Taylor Grazing Act which was to prevent the destruction of public range lands through homesteading.

To construe the language of section 7 to encompass not only these private lieu selections which are clearly within the purview of the Taylor Grazing Act, but also state school indemnity selection does a grave injustice to the language used by Congress in section 7 itself and also to the statement in the Senate report that the amendment was limited to private entities. The court of appeals carefully considered the language of section 7 and held, for a variety of reasons that this language could not be construed to bring school indemnity selections within the ambit of the Secretary's classification authority. The court noted that the primary interest of section 7 was directed to "uses" and that there is no way that school indemnity selections could be considered as "uses." (586 F.2d at p. 772.) The court also noted that the language in section 7 does not speak directly to school indemnity selections but speaks to the much broader general area of lieu selections in general. This general statement as to lieu selections is at variance with the specific criteria contained in 43 U.S.C., section 851 and 852 and the special act must control over the general by virtue of both the rules of statutory construction and also

the trust obligation under which the state holds these lands. (*Id.*, at pp. 766-768.)

The Secretary disputes the limitation placed on the 1976 amendment by the court of appeals, claiming that the testimony of Mr. Page, a private attorney from Arizona shows that Congress intended an opposite result. We seriously doubt whether the testimony of but a single witness before the committee considering a predecessor bill which was substantially changed prior to its ultimate enactment can alter the explicit limitations contained in the report of the complete Senate as to the effect of the bill *actually passed*.

Additionally, the Secretary misconceives what he is required to prove. As we have already shown, the 1934 act can in no way be construed to have eliminated school indemnity selections entirely and, therefore, the Secretary must prove that the 1936 amendment was specifically designed to include school indemnity selections within the ambit of the Taylor Grazing Act. Neither Mr. Page's testimony nor any of the materials cited by the Secretary shows such an intent.

2. Even if the 1936 Amendment to Section 7 is Ambiguous it Must be Construed in Favor of the States

Even if we accept for the sake of argument that the 1936 amendment to section 7 is ambiguous as to whether it was intended to apply to school indemnity selections, in addition to private lieu selections and grants, the states must be given benefit of the doubt. This is mandated by the well-established rule of construction that

school land grant legislation enacted by Congress must be construed liberally (in favor of the states) rather than restrictively. (*Wyoming v. United States*, *supra*, 255 U.S. at 508.) To allow the Secretary such discretion that he could utterly thwart not only individual selections but also the entire indemnity selection process through his classification authority would be a construction of this statute entirely at variance with this well-established rule. The conclusion therefore is inescapable that the 1936 amendment to section 7 must be construed to apply only to private land grants and lieu rights. Such a construction is the only way the various parts of the Taylor Grazing Act can be harmonized.

D. Recent Judicial Decisions Have Recognized that the Taylor Grazing Act did not Alter the Holdings of the *Payne* and *Wyoming* Cases

Returning again to the Secretary's central theme that this Court's decisions in the cases of *Payne v. New Mexico*, *supra*, 255 U.S. 367; and *Wyoming v. United States*, *supra*, 255 U.S. 489 have been legislatively overruled by the enactment of the Taylor Grazing Act, recent decisions of the federal courts have affirmed that the decisions in these cases are still good law. Additionally these cases reaffirm that section 7 must be construed to apply only to *private* entries.

In *Lewis v. Hickel* (9th Cir. 1970) 427 F.2d 673 cert den. 400 U.S. 992 (1971), the issue was one of the Secretary's discretion under the private exchange provisions of section 8 of the Taylor Grazing Act. The private par-



ties relied on the case of *Payne v. New Mexico*. The court, however, carefully distinguished the *Payne* case. It said:

"Appellants place strong reliance upon *Payne v. New Mexico* . . . , a case involving the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. However, that case and other like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with. Hence, the power conferred upon the Secretary was merely 'judicial in its nature' (255 U.S., at 371, 41 S.Ct. 333) in the sense that his only function was to ascertain whether the specific conditions had been met.

"Under the exchange provisions of the Taylor Grazing Act, the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress." (*Id.*, at p. 676, emphasis added.)

Similarly, in *Wilcoxson v. United States* (D.C. Cir. 1963) 313 F.2d 884, the question of the Secretary's discretion under section 7 of the Taylor Grazing Act was raised in relationship to sales under the Isolated Tracts Act. The private parties relied on *Wyoming v. United States*. The court, however, again rejected this contention by carefully distinguishing the *Wyoming* case. The court said:

"We agree with the court below that such cases are inapposite since they arose under statutes from the Isolated Tracts Act. In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they

met the statutory requirements in order to obtain rights in the lands. Hence, '[t]he power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised.' . . . But in the Isolated Tracts Act Congress chose a wholly different method for disposing of interests in the public domain . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The distinction is between a positive mandate to the Secretary and permission to take certain action in his discretion." (313 F.2d at 888, emphasis added.)

While these cases are not dispositive of the issue before this Court as to whether *Payne* and *Wyoming* have been overruled by the enactment of the Taylor Grazing Act because that issue was not directly before the courts, it is significant that in both cases the court took great pains to distinguish *Payne* and *Wyoming*. Obviously, if the courts had felt that *Payne* and *Wyoming* had been overruled they would have said so. But there is not even the slightest suggestion of this anywhere in the decisions. Instead the court treated the *Payne* and *Wyoming* cases as stating entirely good law in spite of the intervening enactment of the Taylor Grazing Act.

Therefore, while not entirely dispositive of the issues before this Court, both *Lewis v. Hickel* and *Wilcoxson v. United States* certainly suggest that the Taylor Grazing Act did nothing to alter the rule enunciated by this Court in the *Payne* and *Wyoming* cases that the Secretary is limited to a ministerial function in approving



school indemnity selections and that the explicit provisions of section 851 and 852 still remain the sole criteria the Secretary may use in determining the validity of a state school indemnity selections.

E. The Congress, the Courts, the Attorney General and the Solicitor of the Department of the Interior Have all Rejected the Secretary's Claims of Discretion

The Secretary has sought to buttress his argument in this case by administrative construction. He has sought to show that the Taylor Grazing Act is but the culmination in a process by which Congress has granted him increasingly broad powers in school indemnity selections and that the only departures from this rule were this Court's decisions in the *Payne* and *Wyoming* cases. This is not true. On a number of occasions both before and after passage, the Taylor Grazing Act, Congress, the courts, the Attorney General, and even his own solicitor have restricted the Secretary's discretion.

1. Recent Decisions Have Tended to Reduce the Secretary's Discretion

A few examples of recent attempts by the Secretary to claim discretion should suffice to show that the continuum claimed by the Secretary does not exist.

The first example has already been detailed in this brief. The Secretary claimed he had discretion to approve or deny school indemnity selections. This Court stopped that attempt by its decisions in *Payne v. New Mexico* and *Wyoming v. United States*. (See *Supra*, pp. 29-32.)

Following passage of the Taylor Grazing Act the Secretary by exercise of his inherent powers sought to avoid the explicit 80,000,000 acre limitation for lands to be included in grazing district contained in section 1 of the act. He took this action in spite of the veto of a bill which would have increased the limit to 143,000,000. His claim was however, rejected by the Attorney General (38 Cal. Ops. Atty. Gen. 350 (1935)).

The next controversy centered around the state exchange provisions in section 8 of the Taylor Grazing Act. The Secretary contended that he had discretion under section 8 of the act in state exchanges. Congress took a different position as seen from the testimony before the Senate Committee on the Public Lands and Surveys:

"Senator Adams. Mr. King, there is no trouble of doing it in the manner, but this says it shall be done when the State applies. Of course, in the manner may be the same, but the necessity for it is different, and it is not discretionary.

"Mr. King. I think, Senator, that is contrary to the opinion of Solicitor Margold.

"Senator Adams. I do not care. You know who is the final authority in this matter. Congress is the final authority, and we can very readily make this so that the Solicitor will understand it.

"Senator Carey. We can clear it up.

"Senator Adams. Yes; if there is any doubt about it." (S. Hgs. on S 2539, *supra*, at p. 48.)

Congress did, in fact, "clear it up" by amending section 8 of the Taylor Grazing Act to take away virtually all of the Secretary's discretion. (See 49 Stats. 1976, (1936).) Still the controversy did not end there. The Secretary

then posed the question of whether he could still reject a state exchange under section 8 by resort to his asserted classification authority under section 7 of the Taylor Grazing Act. This contention was rejected by the Solicitor for the Department of the Interior. (See 61 I.D. 270 (1961).)

Finally, in 1962, the Secretary, pursuant to a solicitor's opinion attempted to adopt extremely broad definition of "producing or producible status," as that term used in 43 U.S.C., section 852. The effect of the adoption of such a definition would have denied the State of Utah certain lands selected for indemnity for losses to the school land grant and would have made it extremely difficult for the states to select mineral lands subject to a lease or permit. (70 I.D. 71 (1962).) The Attorney General rejected such a construction and decided Utah was entitled to the lands. (70 I.D. 65 (1963).)

These decisions show that the continuity claimed by the Secretary does not exist. Recent congressional action has increasingly liberalized and granted to the states greater rights in the selection of school indemnity lands. For example, in 1958, Congress amended section 852 to allow the states to select mineral lands as indemnity and allowed the states to select lands withdrawn under Executive Order 5327 (72 Stats. 928 (1958)); and in 1966 Congress allowed the states to select unsurveyed lands as well as surveyed lands. (80 Stats. 220 (1966).) The recent congressional trend would seem to be, therefore, the exact opposite of that claimed by the Secretary. Congress has consistently liberalized the states' right to se-

lect lands as indemnity for losses to their school land grants.

## 2. The Administrative Construction in this Case is Neither Reasonable nor Controlling

While the courts normally will accord some deference to the administrative construction given a statute, the courts are and must be the final arbiters of a statute. As this Court has stated, the courts:

"... are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' . . ." (*Volsswagenwerk v. FMC* (1968) 391 U.S. 261, 272.)

All the decisions cited by the Secretary are bootstrapped on dicta in but a single decision by the Board of Land Appeals, the decision in *State of Arizona* (55 I.D. 249 (1935)). In that case, the State of Arizona had made an indemnity selection prior to the passage of the Taylor Grazing Act, however, the base was defective. Following passage of the act the state sought to amend its selection by substituting valid base. The board allowed the amendment and, therefore, did not need to consider the question of whether the Taylor Grazing Act deprived the states of all selection rights. But, curiously, the board stated that the effect of the Taylor Act was to cut off entirely all indemnity selections. It is this bit of dicta which has been the sole authority in all subsequent decisions. No authority was cited for this proposition and the decision totally ignores the clear and unequivocal



language in section 1 of the Taylor Grazing Act which exempts school indemnity selections from the purview of the act and the language in section 1 which provides that all rights remain the same unless expressly altered by the act. Surely such a decision with no authority or discussion has no reasonable basis in law and cannot be controlling in this case.

Finally, we fail to see how the Secretary can rely on administrative construction in this case. In a memo to the Secretary in 1962, the associate solicitor stated that there was no basis for an equal value rather than an equal acreage rule. (Quoted at 586 P.2d 762.) This has been the administrative construction for over 160 years. If the Secretary wishes to rely on administrative construction, he should rely on equal acreage not equal value.

#### IV. Even Assuming Arguendo that the Secretary has Discretion, this Discretion Cannot Extend to Equal Value

The court of appeals carefully reviewed the breadth of the discretion claimed by the Secretary in this case and held that even if he had such discretion it could not be unlimited. In rejecting this assertion, the court said:

"The Secretary argues that he has authority under Section 7 to cancel the 'in lieu' selections based upon his discretionary power to 'classify,' but he has not deemed it necessary to spell out the scope or extent of the 'classification' power in the case at bar. In fact, he contends that Section 7 'puts no restrictions on the substance of secretarial discretion.' [Brief of Appellant, p. 31.] The Secretary's contention is erroneous.

The 'classification' criteria were spelled out by the Congress for other types of public land dispositions under the 1936 amendment, i.e. homestead entries and exchange of private land. We agree with Utah that, 'It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the land for retention in federal ownership.' [Brief of Appellee, p. 60.] The breadth and scope of the right of 'classification' claimed by the Secretary creates the very vagueness condemned in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). There the Court held that a statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. See also; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *Sutherland Statutory Construction*, 4th Ed., Vol. 1A, § 21.16." (586 F.2d at 772-773.)

Even if the Secretary has classification authority, therefore, it must be limited and judicial decisions have already held that it cannot extend to imposing an equal value rule.

#### A. The Checkered History of the Equal Value Policy

This so-called equal value rule is not really a rule but a policy. It has never risen to the status of a regulation nor have we or the courts been able to find any criteria on which the Secretary is to evaluate the lands to determine value. This in part is due to the history of the equal value policy.



As has already been shown in 1966, Congress rejected an amendment to section 852 which would have imposed the equal value rule on the states. (*Supra*, at p. 28.) Notwithstanding this rejection in 1967, the Secretary claims to have adopted the equal value rule as a policy. Evidently this policy was not generally known or published. In 1974, the Secretary sent a letter to Governor Rampton of Utah announcing the equal value policy would be applied to Utah's selections in spite of the fact that some of the selections had been already pending for nine years and the policy adopted for seven years.

This policy has never risen to the status of a regulation and evidently no guidelines or criteria have ever been published regarding this policy. The district court and the court of appeals took a skeptical view of this policy.

"At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the 'equal value' urged by the Secretary are nonexistent, or otherwise so vague as to presently fall within the realm of guesswork or speculation." (586 F.2d at 760.)

B. Even Assuming that Classification Authority Exists, Existing Case Law Clearly Establishes it does not Extend to Equal Value

The case of *Bronken v. Morton*, *supra*, 473 F.2d 790, is

dispositive of the issue of whether the Secretary's classification authority (even if it applies here) extends to an equal value policy. In *Bronken v. Morton*, private parties were the holders of certain scrip rights entitling them to select public lands. In 1966, Congress had passed a statute which imposed an approximate equal value rule on these rights whereby they could be exercised for the approximately average value of lands for which such rights had been historically exercised. Rights exercised before a certain date were not, however, subject to the rule but only to "existing law." Some of the private parties exercised their rights prior to the specified date but the Secretary declined to issue them patents on the grounds that the lands selected were of greater value than maximum values set by a regulation adopted 10 years earlier. This regulation was substantially similar to the equal value policy the Secretary asserts here. The court rejected the Secretary's contention that he could apply an equal value rule in spite of the fact that the court recognized the Secretary had the power to classify the lands under section 7 of the Taylor Grazing Act.

The clear holding of the *Bronken* case is that the Secretary's classification authority under section 7 of the Taylor Grazing Act does not extend to imposing an equal value test. If as *Bronken* holds the Secretary cannot do so by regulation, how can he do so by policy? And if he cannot do so when Congress has specifically authorized him to do so after a certain date how can he do so when Congress has refused to enact such a law?

The *Bronken* case is directly on point and if it does not

collaterally estop the Secretary, it is at least dispositive of the issue here. Under existing law, assuming the Secretary has the authority to classify lands under section 7 of the Taylor Grazing Act this authority does not and cannot extend to an equal value rule.

### CONCLUSION

If the Secretary's position is upheld the states will be forced to use a hunt and peck method to satisfy their school indemnity selections. They will be forced to appraise and evaluate for minerals both base and the selected lands. Then, after initiating the selection process, they would have to wait patiently while the Secretary decides in his uncontrolled discretion whether to give the selected lands to the states. If he decides not to, the process will have to begin all over again, at the expense of the states and with no guarantee it will be successful.

The Public Land Law Review Commission in 1970, considered the very issue which is currently before this Court. Their finding was:

"Notwithstanding the progressive statutory liberalization of the states' rights to select indemnity lands, the Department of the Interior (because of a view that it must preserve the bulk of the public domain in Federal ownership) has tended to resist lieu selections when the Bureau of Land Management believes the value of the selected land exceeds the value of the lost land.

"It is apparent from the preceding discussion that present law affords no explicit support for an 'equal value' test. Indeed, the executive branch sought to have the 1966 lieu selection amendments include a

provision denying the states the right to select lands valuable for leasable minerals, unless the lost mineral lands were of equal value. Neither the House of Representatives or the Senate approved the proposal and the Senate report rejected the suggestion as 'extraneous.' " (One Third of the Nation's Land, A Rep. to the President and the Cong. by the Pub. Land L. Rev. Comm., p. 246 (1970).)

The commission recommended that federal agencies should give preference to satisfaction of outstanding state grants and that these should be completed within a short period of time. (*Id.*, at pp. 243, 245.)

This recommendation is even more important today. With current pressures on the states to provide a high degree of governmental services at reduced cost, the school land grants represent an important revenue source for the states. The western states with further selection rights remaining are doubly burdened by the Secretary's importance of the equal value rule because a large portion of the lands within their borders remains in federal ownership and off the tax rolls. But the states are not asking for a windfall. We are only asking for what the other states have already received and was promised in a bargained for exchange, indemnity for school lands which were lost through no fault of our own.

The district court and the court of appeals carefully considered the issues in this case and held the states were entitled to select their school indemnity lands free of secretarial discretion. We ask that this Court do the same and affirm the judgment of the courts below.

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No.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,  
PETITIONER

v.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF JUSTHEIM PETROLEUM COMPANY  
AS AMICUS CURIAE

RICHARD C. CAHOON  
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*351 South State St.  
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Justheim Petroleum Company ("Justheim") is an applicant for State of Utah oil shale lease of lands which are the subject of the state selection applications here under review. Justheim was granted leave to file amicus brief by the Tenth Circuit and submitted an amicus brief to this Court in opposition to grant of certiorari. Justheim files this brief in support of the State of Utah's position.

### QUESTIONS PRESENTED

The Secretary has, in his brief on the merits as well as in his petition for certiorari, isolated the Taylor Grazing Act (the "Act") as the sole source of his purported authority to substitute a "value for value" criterion (or any other he may choose to adopt) for the "acre for acre" criterion clearly established by Utah's enabling act as the basis for indemnity selection.

*The central issue is whether Congress, by the Act, conferred on the Secretary an authority to effect a de facto repeal of the indemnity selection provisions of the western state enabling acts.*

No Secretary publicly betrayed any disposition to interpret the Act to confer such authority until February 14, 1974, nearly half a century after the Act's passage and fifteen years after Congress authorized state acquisition of mineral interests as a part of the indemnification process. Nevertheless, the Secretary now claims that his Act-derived authority to place public lands in grazing districts constitutes plenary power to remove those lands from state selection availability and maintain them in that status until he chooses to classify them as "proper for (state) acquisition" by standards of his own invention.

Our purpose in this brief is to review the fundamentals of statutory construction as they relate to the legislation here relevant. The Secretary so steadfastly directs the Court's attention to *secondary* sources that *primary* sources of enlightenment as to Congressional intent may be overlooked.

### ARGUMENT

#### POINT I

#### THE TAYLOR GRAZING ACT PROVIDES NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER

It cannot be contested that the one purpose of the Act was to protect and reforest the public range. No objective reading of it permits the conclusion that the evil sought to be purged was state abuse of selection machinery. On the contrary, the



Congress carefully protected the states from the threat of Secretarial domination. Consider this language from the 1934 Act:

"Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has heretofore initiated under existing law validly affecting the public lands . . . nor to affect any land heretofore or hereafter surveyed which, except for this chapter, would be a part of any grant to any State, nor as limiting the power of authority of any State as to matters within its jurisdiction."

To defeat the Secretary's claim, a better proviso could scarcely have been designed. These observations are particularly relevant:

*A. Utah indemnity selection right is among those protected from impairment.*

There can be little question that Utah's indemnity selection right is one "initiated under the existing law" within the meaning of the quoted language. The right was not only *initiated under existing law*, it was *conferred by existing law*. Moreover, Utah's rights in federal land were in no sense inchoate; the rights in land to be selected vested at statehood. The enabling act is not a mere promise to indemnify, it is an in praesenti conveyance of rights in land. It conveys the lands necessary to satisfy indemnity requirements in the same sentence and by the same granting clause as it conveys school sections.<sup>1</sup>

*B. The lands Utah has undertaken to select are among those beyond the Secretary's power to "affect" in the exercise of his authority under the Act.*

The Act protects from change in status any lands which "would be a part of any grant to any state". All unappropriated public domain in Utah falls in that category, for all unappropriated public domain is subject to selection under the enabling act grant. The Secretary's placement of lands in a grazing district cannot operate as a withdrawal or have adverse affect on a state's rights therein.

<sup>1</sup>A deed conveying such five acres of Blackacre as the grantee may select is a perfectly valid deed (see discussion at 23 Am. Jur. 2d 265, Deeds § § 222, et seq.) and its validity is not impaired if the selection is confined to acreage not improved at the time of the grantee's selection. Such a deed operates as a conveyance of an undivided interest in Blackacre (*Fisher v. Weichua*, 16 Hawaii 154; *Hodge v. Bennett*, 78 Miss. 868, 29 So. 766; *Sequin v. Malomey*, 198 Ore. 272, 253 P.2d 252, 258 P.2d. 514), the grantee having the right to terminate the contencancy by exercising the right of selection (*Smith v. Furbish*, 68 NH 123, 44 A. 398).

## POINT II

### UTAH'S ENABLING ACT PROVIDES NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER.

Utah's enabling act provides that lands to satisfy indemnity rights "are hereby granted . . . to be selected in such manner as the legislature may provide, with the approval of the Secretary of the Interior." Whatever question there might have been as to the nature of necessary Secretarial "approval" was answered in 1921. As the Secretary concedes at page 29 of his brief, this Court, in *Wyoming v. United States*, 255 U.S. 489 (and less clearly in *Payne v. New Mexico*, 255 U.S. 367) held that the Secretary's function in the selection process is ministerial and not discretionary. The enabling act was construed, just as the Tenth Circuit construed it, to cast upon the Secretary the duty of ascertaining (1) whether the base lands were in fact lost by federal appropriation before the event (statehood or survey) which would otherwise have transferred their ownership to the state, and (2) whether the lands sought to be selected were, as of the date of selection, open public domain, and "of approving or rejecting the application accordingly".

## POINT III

### THE INDEMNITY SELECTION STATUTES PROVIDE NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER.

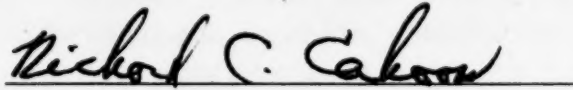
Sections 43 U.S.C. 851-852 (Act of August 27, 1958, 72 Stat, 928) put to rest any questions about whether the Secretary's placement of lands in grazing districts constituted a federal appropriation precluding their selection. For, in those sections, Congress declares that lands of acreage equal to the acreage of lost lands are "appropriated" for indemnification purposes. The sections, as reenacted in 1958, again identify the kinds of federal action which remove federal lands from eligibility for selection. Placement in grazing districts is not one of the identified kinds of action. The original statute (as codified Act of February 28, 1891) also "appropriated" public lands for indemnification. The 1958 reenactment would have been a futile gesture if the entire public domain had already been preempted by the Secretary.

**POINT IV**

**THE SECRETARY URGES CONSIDERATION OF  
MATERIALS WHICH ARE NOT PART OF  
LEGISLATIVE HISTORY AND SHOULD NOT  
INFLUENCE CONSTRUCTION OF STATUTES  
WHICH PRESENT NO AMBIGUITY.**

In its brief in opposition to the Secretary's Petition for Certiorari, Justheim addressed this point at some length. The materials the Secretary views as administrative interpretations of statute have been largely in-house memoranda which were given no public circulation and whose content was inconsistent with decades of departmental practice. The materials he views as reflective of Congressional attitudes are mere statements of individual members of Congress. We refer the Court to Justheim's earlier brief and submit that the materials in question are not worthy of consideration as a source of insight to legislative intent.

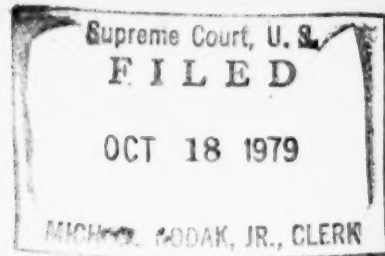
Respectfully submitted this 9th day of October, 1979.



Richard C. Cahoon

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# In the Supreme Court

OF THE

## United States

October Term, 1978

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No. 78-1522

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CECIL D. ANDRUS, Secretary of the Interior  
*Petitioner*

v.

STATE OF UTAH

---

**STATE OF IDAHO**  
**AMICUS CURIAE BRIEF IN**  
**SUPPORT OF THE STATE OF UTAH**

---

DAVID H. LEROY  
ATTORNEY GENERAL  
STATE OF IDAHO  
W. HUGH O'RIORDAN  
DEPUTY ATTORNEY GENERAL  
CHIEF, NATURAL RESOURCES  
DIVISION  
Statehouse  
Boise, Idaho 83720



**In the Supreme Court**

OF THE

**United States**

**October Term, 1978**

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**No. 78-1522**

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CECIL D. ANDRUS, Secretary of the Interior  
*Petitioner*

v.

STATE OF UTAH

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**MOTION OF STATE OF IDAHO FOR LEAVE TO FILE  
BRIEF AS AMICUS CURIAE AND BRIEF IN  
SUPPORT OF THE STATE OF UTAH**

---

DAVID H. LEROY  
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**In the Supreme Court**

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*Petitioner*

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**MOTION OF STATE OF IDAHO FOR LATE FILING  
OF BRIEF AS AMICUS CURIAE IN SUPPORT OF  
STATE OF UTAH**

---

Pursuant to Supreme Court Rule 42, the State of Idaho hereby respectfully moves the court for leave to file its brief *amicus curiae* bound with this motion.

The lateness of this brief is the result of illness and the limited size of staff. The court is urged to accept this brief which represents the views of one affected state.

The State of Idaho is comprised of approximately 52,933,120 acres of land with 63.2% being owned by the United States Government. The Idaho Admissions Bill, 26 Stat. L. 215 Ch. 656 as amended, granted the State of Idaho Sections 16 and 36 in every township of the state for support of its common schools. In furtherance of this legislation Congress enacted 43 U.S.C. §§ 851, 852 which allows selection by the State of lieu lands to replace those which for some reason were unavailable to the State. Negotiations with the federal government to gain lands under this statute have become increasingly complex. The federal government has created a maze of bureaucratic regulations and policies all resulting in a complete frustration of the intent of Congress. The attitude of the Interior Department has been designed to frustrate, stall and impede the lieu land selections of the State of Idaho. The efforts by the United States Department of the Interior to deny the in lieu land selections has been previously rejected by this court in *Payne v. New Mexico*, 255 U.S. 364 (1921) and *Wyoming v. United States*, 255 U.S. 489 (1921). Fifty nine years later the Department still seeks to deny in lieu land selections under the broad catch-all heading of "Secretarial discretion."

As this brief will show, this "discretion" sought by the Secretary is so broad as to have no legal basis or standard. In fact, the Secretary seeks not discretion but an end to the in lieu land program as created by Congress.

The State of Idaho has initiated litigation in Federal District Court for the District of Idaho seeking to protect the selected land selections from waste pending resolution of the issue by this court. The accompanying brief details the frustrations experienced by Idaho and brings to this Court the perspective of another affected state.

Accordingly, the State of Idaho respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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CHIEF, NATURAL RESOURCES

# **In the Supreme Court**

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IN SUPPORT OF STATE OF UTAH**

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## INTRODUCTION

The State of Idaho is composed of 52,933,120 acres of land, with 33,461,313 acres of that land, or 63.2% being owned by the United States government and its agencies. The Idaho Admission Bill, 26 Stat. L. 215 Ch. 656 as amended, (1890) granted the State of Idaho sections 16 and 36 in every township of the state for support of the schools. The Constitution of the State of Idaho declares that:

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public free common schools. Idaho Const. Art. 9 § 1.

In furtherance of this goal the Idaho Constitution provides that the public school fund shall consist of the proceeds of "... such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands, or those granted in lieu of such; ..." Idaho Constitution Art. 9 § 4.

In accepting the offer of the Federal Government, Idaho entered into a trust relationship designed to benefit the school children of Idaho. The grant of school lands and the acceptance by the State created a solemn compact between the United States and the State. *Cooper v. Robert*, 184 U.S. 143 (1855). This statute states that "... other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of Section 852 of this title ..."

The policy behind this statute is simple,

"In giving a state sections in place it was intended that a state would acquire a proportionate part of all classes of

land within its boundaries, and the authorization to make selections *on the basis of equal acreage rather than equal value* carries this policy forward." Report of the Interior Department (1958 U.S. Code Cong. and Adm. News, P. 3965, Emphasis added).

The Interior Department has consistently recognized the right of states to select lands on an equal acreage standard. This is what Congress intended in order to give the western states sufficient funds for the support of the public schools.

In the late 1960's this policy began changing. The Interior Department with its numerous constituencies turned away from the departmental mission of aiding the public schools of the west.

## ARGUMENT

### I.

#### THE HISTORY OF LIEU LAND SELECTIONS IN IDAHO ESTABLISHES A BREACH OF TRUST BY THE UNITED STATES

At present, the State of Idaho has outstanding lieu land selections for approximately 24,000 acres of land. Idaho has made these selections pursuant to 43 U.S.C. §§ 851, 852 and the regulations of the Interior Department. Following are the outstanding selections of the State of Idaho:

Selection List #	Name	U.S. Serial #	Remarks
951	Hoo Doo	I-7318	Original selection made in letter form specifying it was to be an official lieu selection filing. Letter dated September 27, 1973

and included 4,539.15 acres. All other forms required were submitted with the letter except the normal selection list showing the base land. On September 14, 1978, amended selection list #951 was filed, bringing the total land selected to 5,019.15 acres.

954	Hoo Doo Addition	I-15035	Official selection filed on December 20, 1978 and includes 1,185.49 acres.
955	Grand-mother Mountain	I-15036	Official selection filed on December 20, 1978 and includes 3,817.73 acres.
956	Latour Creek	I-15037	Official selection filed on December 20, 1978 and includes 9,849.96 acres.
957	Payette Lakes	I-15038	Official selection filed on December 20, 1978 and includes 1,840.00 acres.
958	Miscellaneous	I-15039	Official selection filed on December 20, 1978 and includes 863.59 acres.
959	Marble Creek	I-15040	Official selection filed on December 20, 1978 and includes 1,439.39 acres.
952	Mineral land Se-lection —	Not Assigned	Official selection filed on November 7, 1977 and includes 760 acres. Lands selected are

Caribou  
County

considered valuable for phosphate and mineral base lands were used in the selection. The BLM advised by letter dated July 18, 1978 that the state selection involved lands currently under BLM lease or permit, and if the state selections are consummated, the mineral or minerals for which the leases or permits are issued would be reserved to the United States. The Department replied by letter October 26, 1978 that due to on going litigation concerning lieu selection that this list would not be withdrawn or amended at this time and that no further action to process the application be taken until the Department requested further action.

Each of these selections has been made in good faith and after extensive discussions with the Department of the Interior. For one reason or another the United States Department of Interior has refused to turn over the lands.

**A. The Conduct of the Department of the Interior Has Not Been Consistent With Its Congressionally Created Trust Obligations.**

Once Idaho had made lieu land selections, the duty of the Secretary was limited. As stated in an earlier lieu lands case,

By it Congress said in substance to the state: if you will waive or surrender your title tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a *vested* right in the selected land which the land officers cannot lawfully control or disregard. *Payne v. New Mexico*, 255 U.S. 367, 370 (1921).

Moreover, in *Wyoming v. United States*, 255 U.S. 489 (1921) the Supreme Court recognized the equitable rights of the state to selected lieu lands.

Equity then regards the state as the owner of the selected tract and the United States as owning the other [the base land]; and this equitable ownership carries with it whatever advantage or disadvantages may arise from a subsequent change in conditions whether one tract or the other be affected. *Wyoming v. United States* at 497.

Congress then has created a strict and continuing trust obligation upon the public land states in the school land grant statutes.

These enactments " . . . are set apart and given special, independent treatment, much akin to the special preference and treatment of Indians recognized in *Morton v. Mancari*, 417 U.S. 535 (1974)." *Utah v. Andrus*, at 586 F. 2d 756, 769 (1978). This grant legislation, in creating a binding trust obligation between the United States and Idaho, is " . . . an absolute grant, vesting title for a specific purpose." *Utah v. Andrus*, at 758.

. . . it is strikingly clear that Congress did grant the states broad rights in effecting indemnity selections. There is no question that the "equal acreage" language



originally set forth in § 851, *supra*, has been retained throughout its amendatory history. At no time has the Congress used the "equal value" reference. *Utah v. Andrus*, 767, 768.

Idaho therefore, in selecting the lands now in issue, became equitable owner of those lands. By not turning those lands over to the State of Idaho the Secretary of Interior has breached the trust relationship with Idaho.

**B. The Attempt by the Secretary to Create an Open-Ended Condition Precedent to Lieu Land Selections Is Improper.**

The Secretary of the Interior, in placing roadblocks to Idaho's lieu land selections, has not denied the efficacy of 43 U.S.C. §§ 851 and 852, but has instead urged that § 43 U.S.C. § 315(f) of the Taylor Grazing Act when coupled with Executive Order 6910 establishes a mechanism which allows the Secretary to determine which lands are to be given as in lieu selections. This discretionary authority asserted by the Department is broad and for all intents and purposes unlimited.

The position of the Secretary while erroneous is not surprising. In June of 1970 the Public Land Law Review Commission (PLLRC) noted the tendency of the Department of the Interior to resist land selections. The report stated:

Notwithstanding the progressive statutory liberalization of the states' rights to select indemnity lands, the Department of the Interior (because of a view that it must preserve the bulk of the public domain in Federal ownership) *has tended to resist lieu selections* when the Bureau of Land Management believes the value of the selected lands exceeds the value of the lost land. PLLRC at 246 (Emphasis added.)

This tendency to resist lieu land selections has manifested itself in a never ending series of road blocks. The issue now has narrowed down to an interpretation of the Taylor Grazing Act.

Contrary to the assertion of the Secretary the Taylor Grazing Act does not confer upon the Interior Department authority to classify lands within a grazing district as a condition precedent to the selection of lands by the states. This is so because, first, § 1 of the Taylor Grazing Act by specific language exempts land grants to the states.

*Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, . . . except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any state . . .* [Emphasis added.] 43 U.S.C. § 315.

Idaho, as the recipient of a specific land grant under the Admission Act 26 Stat. L. 215, Ch. 656, is exempted from the workings of this statute.

Second, the Secretary's attempt to rely on § 7 of the Taylor Grazing Act, 43 U.S.C. § 315(f), as specific authority overturning 43 U.S.C. §§ 851, 852 fails to distinguish between private rights and public rights. While § 7 gives the Secretary authority to classify land grant and selection rights, it specifically states, " . . . such lands shall not be subjected to disposition . . . until after the same *have been classified and open to entry*." 43 U.S.C. § 315(f) [Emphasis added.] "Entries" to public lands refer to private land entries and not to land grants given to states.

In *Lewis v. Hickie*, 427 F.2d 673, 646 (9th Cir. 1970) the Ninth Circuit distinguished the Secretary's authority for land grants from the authority under the Taylor Grazing Act.

*Payne v. New Mexico* involved the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with . . . Under the Taylor Grazing Act the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. 427 F.2d at 676. [Emphasis added.]

Other courts have made the same distinction. See *Wilcoxson v. United States*, 313 F.2d 884 (D.C.Cir. 1963); *Ferry v. Udall*, 336 F.2d 706 (4th Cir. 1964).

Given the fact that § 1 of the Taylor Grazing Act specifically excludes grants to states from the workings of the statute, it is clear that Idaho's lieu land selections are exempt from the statutes.

Congressional history supports this conclusion.

It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing. Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, 2 [Emphasis added.]

Statutory construction and legislative history strongly support Idaho's position that the Taylor Grazing Act does not create a condition precedent to lieu land selections.

## II.

### THE SECRETARY IN ATTEMPTING TO GAIN BROAD DISCRETIONARY AUTHORITY OVER LIEU LAND SELECTIONS IS ACTING CONTRARY TO THE UNEQUIVOCAL INTENT OF CONGRESS

The procedures established by Congress for selecting lieu lands is simple. 43 U.S.C. § 852 provides that the state may select lands from any unappropriated, surveyed or unsurveyed public lands within the state. Lands mineral in character, however, may only be selected to the extent that the applicable base lands are also mineral in character. This limitation also applies to lands selected in areas of known geologic structures for production of oil and gas. Congress has in essence stated that once a qualified state such as Idaho selects lands pursuant to 43 U.S.C. §§ 851, 852, the Secretary has an affirmative obligation to clearlist the lands.

#### A. The Secretary in this Action is Attempting to Relitigate the Public Interest Criteria Rejected by this Court in *Payne v. New Mexico* and *United States v. Wyoming*.

The Secretary in arguing that the Taylor Grazing Act of 1934 coupled with Executive Order 6910 " . . . effectively overturned *Payne* and *Wyoming* by restoring to the Secretary his traditional discretion to control the selection process in the public interest." (Brief of Petitioner at 24-30), goes too far. According to the theory urged upon this court by the Secretary, the Taylor Grazing Act of 1934 created a *tabula rosa* and allowed the Secretary to exercise complete discretion over lieu land selections.

Two factors mitigate against the Secretary's position. First, these decisions are strikingly similar to the case at



hand and second, as established in Argument I, the terms and history of the Taylor Grazing Act do not support such a sweeping contention.

In *Payne v. New Mexico*, 255 U.S. 367 (1921) this Court rejected arguments of the Secretary for an open ended discretionary authority over in lieu land selections by stating,

But it is said that as the selection is "subject to the approval of the Secretary of the Interior," no right can become vested nor equitable title be acquired thereunder unless and until his approval is had; and therefore that the rule just stated is not applicable. *To this we cannot assert.* *Payne* at 371. [Emphasis added.]

The power of the Secretary is "... Judicial in its nature ..." *Payne* at 371. This Court further stated in language equally appropriate today that "... this view has been recognized and applied by the land department, although not with uniformity." at 342.

In *Wyoming v. United States*, 255 U.S. 489 (1921) an attempt by the Interior Department to judge the validity of the land selected by changed circumstances was rejected. Here the court stated,

Equity then regards the state as the owner of the selected tract, and the United States owning the other; and this equitable ownership carries with it whatever advantage or disadvantages may arise from a subsequent change of conditions, ... *Wyoming* at 497.

The issues before this court in *Payne* and *Wyoming* were remarkably similar to those asserted today. In fact, a reading of the briefs from the October terms of 1919 and 1920 magnifies the impact of the similarities of these cases to the one at hand.

The entire case of the appellants may be stated thus — That an executed exchange of lands between a State and the United States implies an offer and acceptance and that such exchange requires the act of two parties — the State and the United States *acting through the Secretary.*

\*\*\*

The major difference between us and the appellants, however, is over their claim that in the matter of an exchange the United States acts through the Secretary. *The United States acts through Congress we think, and did so act when it made the grant of lieu lands* which was very solemnly accepted by the State several years ago simultaneously with its acceptance of the grant of the specific school sections. P. 26 and 27. [Emphasis added.] Brief of Appellee, *Payne v. New Mexico*.

Only the argument by the Secretary regarding the Taylor Act is new. When taken within context of the 1919 and 1920 briefs the bootstrap nature of this argument is readily apparent.

The strong statements of this court regarding lieu land selections are equally applicable today. The Secretary is merely attempting to relitigate issues resolved by this Court fifty-nine years ago.

#### **B. The Classification Procedure Urged by the Secretary Is Fictitious and Based Upon No Discernible Standard.**

While the Secretary has asserted that the classification procedure prior to lieu land selection is needed to assure effective administration of the public lands, the classification procedure established by the Secretary is based upon no discernible standard.



The equal value criteria urged by the Secretary is arbitrary. As the Tenth Circuit Court pointed out.

Thus, at this time, it seems that we can safely relate — based upon the arguments presented and the record before us — that the criteria, processes and materials for determination of the "equal value" urged by the Secretary are non-existent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. We believe that it is most unlikely that Congress intended to vest such discretion in the Secretary in light of the historical background leading to the enactment of the "in lieu" statutes . . . *Utah v. Andrus*, at 760-61.

The Public Land Law Review Commission noted the invalidity of the value criteria urged by the Interior Department.

It is apparent from the preceding discussion that present law affords no explicit support for an "equal value" test. Indeed, the executive branch sought to have the 1966 lieu selection amendments include a provision denying the states the right to select lands valuable for leasable minerals, unless the lost mineral lands were of equal value. Neither the House of Representatives or the Senate approved the proposal, and the *Senate report rejected the suggestion* as "extraneous." PLLRC at 246 [Emphasis added.]

The PLLRC Report goes on to discuss the Secretary of the Interior's approval of guidelines despite the congressional refusal to adopt the equal value restriction.

Under these guidelines, values are estimated for lost lands in their "native" condition, i.e., at time of grant, and for selected lands in their "present" conditions, i.e., at time of selection. PLLRC at 246.

The unfairness of these guidelines is obvious. What is also obvious is the cynicism of the Department in urging a value criteria which is in essence fictitious.

The Secretary's classification procedure in Idaho has resulted in delay without there being any discernible standard.

After 85 years the State of Idaho is trapped in a bureaucratic maze of conditions and interpretations unilaterally imposed by the Secretary. These conditions have resulted in loss of funds for school children of Idaho.

In one lieu land selection all five members of the Idaho State Board of Land Commissioners (comprised of the Governor, Secretary of State, Attorney General, State Auditor and Superintendent of Public Instruction) urged the Secretary to end what had been four years of delay.

The Idaho State Board of Land Commissioners has granted audience to any and all who have requested the opportunity to appear before them. This includes state agencies, Fremont County Commissioners, Fremont County Planning and Zoning Commissioners, and other citizens. This Board, the supreme land authority in Idaho gave a great deal of time to people who protested and have now reached a decision. Due process was afforded; the debate has to end. We, the undersigned members of the State Board of Land Commissioners urge you to proceed with deliberate speed in the satisfaction of these selections, leading to the clear listing of these lands to the State of Idaho at the earliest possible time. (Appendix A.)

The result of the March 22, 1976 letter from the State Board of Land Commissioners was a response from the Secretary of the Interior dated April 14, 1976, informing the

State of Idaho that a decision would be reached following continued analysis of the problem. This letter is attached hereto as Appendix B. Two days later, on April 16, 1976, the State received a second letter, this one from the Deputy Assistant Secretary of the Interior stating that the information available was insufficient to make a final decision. (It should be noted that this was after approximately four years of consideration and at least one environmental impact analysis). The entire matter was returned to the State Director of the Bureau of Land Management for further study and investigation. The letter informs the State that:

We regret this delay; however, we must have a firm understanding of environmental, social, and economic impact of our decision.

This correspondence demonstrates that the environmental, social and economic studies will go on indefinitely. Appendix D is a memorandum from the State Director of BLM to the Director of the Idaho Department of Lands admitting that new requirements had been added. The memorandum states,

Standards and requirements have significantly increased since these documents were prepared. Also we were proceeding on the assumption that the matter was essentially an administrative title transfer involving no definable environmental impacts.

This memorandum from the Director of BLM to the State Director of Idaho clearly establishes that a complicated and obtuse procedure of review was added by the Secretary. From these procedures it is clear that the "discretion" now urged by the Secretary is very arbitrary.

Idaho is still struggling with the arbitrary decisions of the Secretary. Most recently Idaho discovered that the Secretary

was leasing and cutting timber on lands selected by the State. On March 22, 1979, the State Director of BLM detailed the "income producing activities" of the lands selected by the State of Idaho. [Appendix E.]

The extent of Secretarial discretion is great indeed. What the Secretary argues for in this case is extensive authority to select for the State of Idaho which lands are to be given as in lieu selections.

### CONCLUSION

Lieu land selections in the State of Idaho as in the State of Utah have been stalled by arbitrary and never ending bureaucratic maneuvers. The Secretary in this case seeks more authority to deny the western states their School Indemnity Land Selections. The State of Idaho urges this Court to affirm the decision of the Tenth Circuit Court of Appeals which recognizes the right of the western states to their lieu land selections.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on the \_\_\_\_ day of October, 1979, three copies of the MOTION OF STATE OF IDAHO FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE STATE OF UTAH were mailed, postage prepaid, to:

HONORABLE WADE McCREE  
SOLICITOR GENERAL  
DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

ROBERT B. HANSEN  
ATTORNEY GENERAL  
STATE OF UTAH  
236 STATE CAPITOL  
SALT LAKE CITY, UTAH 84114

and further that all parties required to be served were served.

Respectfully submitted,

DAVID H. LEROY  
ATTORNEY GENERAL  
STATE OF IDAHO

**APPENDIX A**

22 MARCH 1976

The Honorable Thomas S. Kleppe  
Secretary, Department of The Interior  
Interior Bldg., C St. Between 18th & 19th N.W.  
Washington, D.C. 20240

Dear Mr. Secretary:

The State of Idaho is attempting to obtain title to lands as indemnity for lands pre-empted by the United States through the creation of the National Forests, Parks, Historic Monuments, Indian Reservations and other causes. The State Board of Land Commissioners is a constitutional board made up of the Governor, Secretary of State, Attorney General, State Auditor, and Superintendent of Public Instruction. This board has broad discretionary power and complete authority over acquisition and disposition of all lands held in the name of the State of Idaho. The courts have ruled the board has quasi-judicial authority. The authority of this board over state land matters in Idaho is recognized by the Bureau of Land Management, Washington Office and Idaho State Office.

To aid in this effort, the Idaho Legislature created a bipartisan committee with members from both houses for the purpose of studying and recommending to the State Board of Land Commissioners concerning selections to resolve this long-standing matter.

On 16 November 1972 the State filed selections on certain lands in Fremont County, Idaho, in the vicinity of the Island Park Reservoir. This selection includes State Selection Lists Numbers 915-925 and 945-949; Idaho State BLM Office



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Number I-6307-6317 and I-6302-6306. The State Office of the BLM has completed its processing of these selections. We are advised that nine protests opposing these selections have been filed with the Secretary of The Interior.

The Idaho State Board of Land Commissioners has granted audience to any and all who have requested the opportunity to appear before them. This includes state agencies, Fremont County Commissioners, Fremont County Planning and Zoning Commission, and other citizens. This board, the supreme land authority in Idaho, gave a great deal of time to people who protested and have now reached a decision. Due process was afforded; the debate has to end.

We, the undersigned members of the State Board of Land Commissioners, urge you to proceed with deliberate speed in the satisfaction of these selections, leading to the clear listing of these lands to the State of Idaho at the earliest possible time.

Respectfully,

/s/ \_\_\_\_\_  
CECIL D. ANDRUS, GOVERNOR  
AND PRESIDENT OF THE STATE  
BOARD OF LAND COMMISSIONERS

/s/ \_\_\_\_\_  
PETE T. CENARRUSA, SECRETARY  
OF STATE

/s/ \_\_\_\_\_  
WAYNE L. KIDWELL, ATTORNEY  
GENERAL

/s/ \_\_\_\_\_  
JOE R. WILLIAMS, STATE AU-  
DITOR

/s/ \_\_\_\_\_  
ROY TRUBY, SUPERINTENDENT OF  
PUBLIC INSTRUCTION

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/s/ \_\_\_\_\_  
GORDON C. TROMBLEY, SECRE-  
TARY & DIRECTOR, DEPARTMENT  
OF LANDS

GCT: fb

cc: SENATOR FRANK CHURCH  
SENATOR JAMES A. McCLURE  
CONGRESSMAN STEVEN D. SYMMS  
CONGRESSMAN GEORGE HANSEN  
IDAHO STATE DIRECTOR, BLM  
IDAHO STATE LAND GRANTS COMMITTEE

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**APPENDIX B**  
**UNITED STATES**  
**DEPARTMENT OF THE INTERIOR**  
**OFFICE OF THE SECRETARY**  
**WASHINGTON, D.C. 20240**

In Reply Refer To:

2621 (322)  
I-6307 et al.  
13552

Dear Governor Andrus:

This is in reply to your letter of March 22, 1976, co-signed by the other members of the State Board of Land Commissioners, regarding the State indemnity selections filed by your office.

As mentioned in your letter, several protests to the initial classification decision of the Bureau of Land Management's Idaho State Director have been received by our Office. We are considering as expeditiously as possible these protests, as well as, the information upon which the BLM Idaho State Director made his decision. As soon as this information has been analyzed, a final classification decision will be made. We will make certain you are notified promptly when this final decision is reached.

With best wishes.

Sincerely yours,

/s/ \_\_\_\_\_  
THOMAS S. KLEPPE  
SECRETARY OF THE INTERIOR

HONORABLE CECIL D. ANDRUS  
GOVERNOR AND PRESIDENT OF THE STATE  
BOARD OF LAND COMMISSIONERS  
IDAHO DEPARTMENT OF LANDS  
STATE CAPITOL BUILDING  
BOISE, IDAHO 83720

**APPENDIX C**  
**UNITED STATES**  
**DEPARTMENT OF THE INTERIOR**  
**OFFICE OF THE SECRETARY**  
**WASHINGTON, D.C. 20240**

In Reply Refer To:

2620 (322)

I-6307 et al.

Dear Governor Andrus:

This is in further reply to your letter of March 22, 1976, cosigned by the other members of the State Board of Land Commissioners, regarding the State indemnity selections filed by your office.

We have made a detailed study of the facts associated with the classification of the lands that you identified for State indemnity selection. From this analysis, we have concluded that there is presently insufficient information available to address and answer the protests or to determine if the classification is proper. Because of this situation, we have vacated the initial classification decision of the Bureau of Land Management's Idaho State Director and remanded the cases to him for further study and investigation.

We have also notified the State Director that your existing applications will be preserved and will continue to serve as the basis for the future analysis. We would like to emphasize that we have not rejected your applications nor have we made any decision as to the suitability of the lands for State indemnity selection. Decisions pertaining to the proper land-use classification and subsequently those regarding your applications will be made after this study has been completed.



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We regret this delay; however, we must have a firm understanding of the environmental, social, and economic impacts of our decision.

When the Idaho State Director has completed his study and has issued his decisions, you will be given the opportunity to make comments or suggestions both to him and to this Office as appropriate. All groups and individuals who have expressed an interest in this case will also be given this opportunity so that we might best determine actions that are in the public interest.

Sincerely yours,

/s/ \_\_\_\_\_  
DEPUTY ASSISTANT  
SECRETARY OF THE INTERIOR

HON. CECIL D. ANDRUS  
GOVERNOR AND PRESIDENT OF THE STATE  
BOARD OF LAND COMMISSIONERS  
IDAHO DEPARTMENT OF LANDS  
STATE CAPITOL BUILDING  
BOISE, IDAHO 83720

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APPENDIX D  
UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

Mr. Gordon Trombley, Director  
State of Idaho, Dept. of Lands  
State Capitol Building  
Boise, ID 83720

Dear Gordon:

I am now able to supply additional information concerning the proposed Island Park lieu selection.

I find that protests of classification decisions are not considered by the Interior Board of Land Appeals; instead they are considered directly by the Secretary's Office. Staff review of the supporting documents, consisting primarily of the Land Report and the Environmental Analysis Report, indicated these documents are deficient as a basis for Departmental consideration. Standards and requirements have significantly increased since these documents were prepared; also we were proceeding on the assumption that the matter was essentially an administrative title transfer involving no definable environmental impacts.

Enclosed is a copy of instructions we have received dated April 30, 1976. You will note that we have a great deal of work to do, including an update of our Management Framework Plan (MFP) and reworking our Land Report and Environmental Analysis Report (EAR). Assistance from the State in developing data and analyses dealing with the water and wildlife resources, in preparing the historic analysis of the State's land disposal system (requested by the

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April 30 instruction) and in the conduct of any needed public meetings to resolve conflicts, would expedite the process.

I think there is quite a lot of misunderstanding on the part of the Legislative Committee as well as the State Land Board as to the details of this proposal, including the magnitude of opposition. Enclosed is a summary of significant actions concerning this proposal that may be of help to bring everyone up to date.

I'm not optimistic that we can overcome the existing conflicts in a manner adequate to pave the way for completion of the selection as presently proposed. However, we are more than willing to give it another try if the State so desires. We may wish to reconsider the matter and delete the acreages that are of special concern to the State Parks and Fish and Game Departments.

We look forward to meeting with you again on May 11.

Sincerely yours,

/s/ \_\_\_\_\_  
WM. L. MATHEWS  
STATE DIRECTOR

Enclosures

Cy 4/30 memo from WO

Summary significant actions

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**APPENDIX E**  
**UNITED STATES**  
**DEPARTMENT OF THE INTERIOR**  
**BUREAU OF LAND MANAGEMENT**

Mr. Gordon C. Trombley  
Idaho Department of Lands  
Statehouse  
Boise, Idaho 83720

Dear Mr. Trombley:

This is in further response to your letter of January 22, 1979, regarding your most recent State indemnity selections. In contrast to your opinion that equitable title passes upon your selection of lands, it remains the policy of the Secretary of the Interior that he has discretionary authority to determine which lands pass into State ownership through indemnity selections. However, since this discretionary authority has been successfully challenged by Utah in the Ninth Circuit Court, we can understand the reasoning behind your statement and your request for this information.

Enclosed you will find a summary of income-producing activities for the lands which you have selected. This was prepared in our Coeur d'Alene District Office. If you have any specific questions, you should direct them to Martin J. Zimmer, Coeur d'Alene District Manager.

Sincerely yours,

/s/ \_\_\_\_\_  
WILLIAM L. MATHEWS  
STATE DIRECTOR

Enclosure:  
As stated  
cc: District Manager,  
Coeur d'Alene (w/o encl.)

## In Reply Refer To:

2621 (480)

I-7318, I-15035, I-15036,  
I-14357, I-15037, I-15039,  
I-15040

The date requested for each selection area is listed as follows:

1. North Hoodoo and New Port Hill Selection — I-7318 of 9-27-73 as received by the Bureau of Land Management on 9-28-73:

Hoodoo Timber Sale Contract 11060-TS4-013 — Date this contract was approved was on August 27, 1974. It was sold at public auction on June 25, 1974. All field work was completed for this sale prior to October 1, 1973.

Species	Timber Sold			Total Value Paid
	Volume MBf	Appraised Value MBf	Contract Bid Value/ MBf	
Douglas fir	1,449	27.50	54.00	78,246.00
Grand fir	1,392	20.05	45.00	62,640.00
Western larch	1,279	23.90	49.00	62,671.00
Western White Pine	877	83.25	85.00	74,545.00
Lodgepole Pine	369	16.20	16.20	5,977.80
Western Red Cedar	63	33.65	40.00	2,520.00
Western Hemlock	14	19.50	19.50	273.00
Englemann Spruce	6	32.40	32.40	194.40
Alpine fir	---	19.50	19.50	---
Ponderosa Pine	139	70.55	70.55	9,806.45
	5,588			\$296,873.65

Contract Modification addition 54MBf valued at\$ 2,800.00  
Unauthorized cutting on contract area-16MBf-Value Col-  
lected \$ 992.00  
Total Volume Removed-5,658MBf Total  
Value received \$300,465.65

This contract was terminated on August 29, 1978.

Road easement I-4338 was obtained to harvest timber on New Port Hill land which was selected under I-7318. This sale was terminated about 1972.

2. South Hoodoo Selection I-15035 made December 22, 1978, Curtis Creek Timber Sale field work was completed prior to November 1, 1978. Timber is to be sold in a joint sale with the U.S. Forest Service and is going to be appraised and a contract be prepared as soon as the remaining field work is completed in March. The Forest Service is planning to submit both the BLM and USFS timber cruise data for volume compilation by April 1, 1979.

It is anticipated a total of about 8MBf per acre of cutting area will be removed. This sale will probably be offered on or about July 1, 1979. Actual volume by species and its sale value may be obtained when it is offered and sold at public auction.

Road rights-of-way of record effecting both Hoodoo Selections are as follows:

I-8817 is the BLM road constructed and used to remove timber sold under contract 11060-TS4-013. Also the road right-of-way reserved by PLO 5421 to the U.S. Forest Service was also constructed to remove timber sold under this contract and for later contracts from adjoining lands on Hoodoo Mountain. Right-of-way under I-14651 was issued to the U.S. Forest Service to extend this road system.

3. Grandmother Mountain Selections I-14357 made December 16, 1977 and amended January 16, 1978 and I-15036 made December 22, 1978.



The Two-Bit Flewsie Timber Sale contract #11060-TS8-010 was sold on September 25, 1978. Most of the field work for this sale was done prior to November 1, 1978. Some final boundary and road right-of-way posting was done by or about July 1, 1978. This timber sale contract will be supervised jointly by the U.S. Forest Service and the BLM under a Forest Service contract. The Bennett Tree Farms, Inc. was notified on September 26, 1978 it was the apparent high bidder for the sale. The final awarding of the contract was delayed pending the Forest Service obtaining a satisfactory road construction bid.

Species	Volume MBf	Appraised	Bid	Total Value
		Value MBf	Value MBf	
Grand fir	1,430	9.86	131.00	\$187,330.00
Larch	445	63.86	93.00	41,385.00
Lodgepole Pine	65	13.20	13.20	858.00
White Pine	305	165.64	165.64	40,520.20
Douglas fir	205	56.29	56.29	11,539.45
Cedar	510	176.38	226.00	115,260.00
Hemlock	180	13.89	13.89	2,500.20
TOTAL	3,140			\$399,392.85
Pulp	5	1.00	1.00	5.00
Cedar Products	165c units	1.00	1.00	165.00
				\$399,562.85

This contract has not been issued and will be delayed until a road contract is let. No timber will be removed until road construction is initiated. A copy of the timber sale volume summary, advertised timber sale notice cover page and notice of apparent high bidder is attached.

On the Grandmother Mountain Selections, the following USFS and BLM road rights-of-way were noted:

I-014136 and PLO 4767 reserving mainline road right-of-way across public land in Secs. 11 & 12, T.42N., R.2E., B.M. This public land has a small campground located upon it adjacent to the junction with Gold Center Creek.

Road easement I-5139 was obtained from the Potlatch Corporation to the lower Merry Creek timber sale which was terminated about five years ago. I-7343 was the road right-of-way built on and used to harvest the Merry Creek timber sale.

Road right-of-way I-013067 was for roads built to remove timber harvested from public lands in Secs. 34 & 35, T.43N., R.2E. prior to 1965.

Access road and powerline right-of-way under I-2957 was issued to Bonneville Power for the Dworshak-Hotsprings line across public lands in this selection.

Road right-of-way I-7343 was built and used to harvest the West Elk No. 2. Timber sale in Sec. 12, T.43N., R.1E. B.M. which was terminated about 1974. Road easement I-4882 was obtained from Potlatch Corporation to be used in the harvest of this timber.

Road right-of-way I-1422 & I-5868 were obtained from the USFS by the BLM to be used in connection with the East Elk and West Elk No. 2 sales which were terminated prior to 1974.

The U.S. Forest Service also obtained road rights-of-way from the BLM under serial no. I-14688, I-3642, and PLO 5271, for use in harvesting National Forest timber in T.43N. R.2E. and elsewhere.

Road easement I-12823 was obtained from the Potlatch Corporation to harvest timber from the NE $\frac{1}{4}$ NE $\frac{1}{4}$  Section 10, T.43N., R.2E., B.M.

4. Black Rock Ridge-Latour Creek Selection I-15037 made December 22, 1978. There are no ongoing timber sale contracts in this selection area. The Bureau has done timber sale layout and road route work, but no timber has been cruised.

There are three grazing leases effecting lands within this selection as follows:

Dale M. Bly	76 AUMs @ 1.98/AUM	= \$150.48
Christman & Fitzgerald	19 AUMs @ 1.98/AUM	37.62
Nels Vines	40 AUMs @ 1.98/AUM	79.20
		<hr/>
		\$267.30

However, these leases also effect lands not selected and could not be separated at this time.

5. There were road easements obtained under serial nos. I-7267, I-016880, I-015308, I-015106, I-016674, I-3792, I-015817, I-017267, I-015866, I-8255, and I-016881 and built to serve lands effected by State Lieu Selection I-15037. Also road rights-of-way I-8975, and I-10208 across National Forest lands and public land were built and used to harvest the Black Rock Timber Sale which was terminated in 1977.
6. On State Selections I-15039 and I-15040 there are no ongoing timber sales, leases, or permits on or after the date of selection application of December 22, 1978.

However, there were road easements obtained from the State of Idaho to harvest timber from the lands selected under I-15040. This contract was terminated about 1977.

You will note that the Bureau had done all field work prior to State Selection application and was committed to offer the timber for sale. No new sales or permits were prepared after the State Selection applications were made. Also all sales were planned for 3 to 10 years prior to their sale date.

Most of the land selected have limited grazing values and have no existing leases or permits for other land uses.